SUPREME COURT, U. S
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MICHAEL RODA

No. 73-1143

In the

Supreme Court of the United States

OCTOBER TERM, 1973

BOOKBINDERS LOCAL NO. 60, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS, A. F. OF L.-C. I. O., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD AND INTER-COLLEGIATE PRESS, GRAPHIC ARTS DIVISION, SARGENT WELCH SCIENTIFIC COMPANY AND SARGENT WELCH SCIENTIFIC COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI.

To the United States Court of Appeals for the Eighth Circuit.

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BOOKBINDERS LOCAL NO. 60, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS, A. F. OF L.-C. I. O., *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTER-COLLEGIATE PRESS, GRAPHIC ARTS DIVISION, SARGENT WELCH SCIENTIFIC COMPANY AND SARGENT WELCH SCIENTIFIC COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI.

To the United States Court of Appeals for the Eighth Circuit.

No. .....

Petitioner, Bookbinders Local No. 60, International Brotherhood of Bookbinders, A. F. of L.-C. I. O., respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered in this case on October 25, 1973.

OPINIONS BELOW.

The decision and order of the National Labor Relations Board are reported at 199 NLRB No. 35, which have not yet been published in bound form but are unofficially reported at 81 LRRM 1508 and are set forth in Appendix B, *infra*, B-1-47. The opinion of the United States Court of Appeals for the Eighth Circuit, dated October 25, 1973, is reported at 486 F2d 837, 84 LRRM 2562 and is set forth in Appendix A, *infra*, A-1-16.

JURISDICTION.

The opinion of the Court below was entered on October 25, 1973. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Does an employer violate Sec. 8 (a) (1) or (3) of the National Labor Relations Act by employing replacement employees to do the work of its Bargaining Unit employees after having locked out its Bargaining Unit employees during a labor dispute?

2. Are the decisions of the National Labor Relations Board concerning the hiring of replacement employees while maintraining a lockout of regular employees inconsistent, unreasonable and arbitrary?

STATUTES INVOLVED.

The statutes which the case involves are Sections 7, 8 (a) (1), 8 (a) (3), and 13 of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). They are printed in Appendix C, *infra*, C-1.

STATEMENT OF THE CASE.

After a number of negotiating sessions between the company and the Union, the employer locked out all of its employees represented by the Union on October 16, 1970 (B. 22). The lockout continued until June 1, 1971 (B. 26). Commencing on November 30, 1970, the Company hired new employees to replace the locked out employees and continued to employ some of the replacement workers after it ended the lockout (B. 24).

After the lockout and prior to the employment of replacement workers, the Union demanded that the Company end the lockout and on behalf of the locked out employees, offered their return to work "on an unconditional basis." The Company responded by offering to end the lockout in return for a no-strike commitment from the Union until July 1, 1971. The Union agreed to give a no-strike commitment if the Company would guarantee an agreement acceptable to its employees by July 1, 1971 (B. 22).

The Administrative Law judge found "no significant difference" between the instant case and the prior Labor Board case of *Inland Trucking Company*, 179 NLRB 350 (1969); enforced 440 F2d 362 (7th Cir., 1971); cert. denied, 404 U.S. 838 (1972) (B. 36).

The National Labor Relations Board in a 2-1-2 decision, reversed the conclusions of the Administrative Law Judge that the employer had violated Section 8 (a) (1) and (3) of the Act. Two members were of the opinion that "absent anti-union motivation * * * an employer does not violate Section 8 (a) (3) or 8 (a) (1) of the Act by hiring temporary replacements to continue operations during an otherwise lawful lockout" (B. 2). The Chairman, while giving *ad hoc* recognition to the views set forth in *Inland Trucking*, erroneously ruled that since the replacement workers "* * * were to be used for the duration of the labor dispute only" and since the employer had offered terms and conditions of employment somewhat better

than those in the expired contract and had agreed to a Union security clause, there was no violation of the Act (B. 6). The two dissenting members ruled that the employer's conduct in using replacement workers from outside sources for a prolonged period was inherently destructive of the rights of the Bargaining Unit employees and *per se* violative of Section 8 (a) (1) and (3), regardless of the employer's motivation (B. 10). In addition, they ruled that the employer had failed to show legitimate and substantial business justification for its conduct.

The United States Court of Appeals for the Eighth Circuit affirmed the Board's dismissal of the complaint. Jurisdiction of the Court of Appeals was established pursuant to Section 10(f) of the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT.

The question presented in the instant case, that is, whether or not an employer may hire replacement workers during a lockout was specifically reserved by this Court for future decision when the Court decided *American Shipbuilding Co. v. NLRB*, 380 U. S. 300, 308, fn. 8 (1965). In a companion case decided the same day, the Court approved as lawful the conduct of non-struck employers locking out their employees and using replacement labor in defense of and in response to the union's whipsaw strike against another employer in the multi-employer bargaining unit. *NLRB v. Brown*, 380 U. S. 278 (1965).

Subsequent to the decision in *American Ship* and *Brown*, the National Labor Relations Board and the United States Court of Appeals for the Seventh Circuit held that the employer's use of replacement workers during a lockout was inherently prejudicial and destructive of Section 7 rights. *Inland Trucking, supra.*

In the Board's decision in the case of *Ottawa Silica Company*, 197 NLRB No. 53, 80 LRRM 1404 (1972), a 2-1-2

split developed, two members holding that, absent anti-union motivation employer conduct such as in this case was lawful (id. LRRM 1408), two members finding the conduct inherently destructive of protected rights and without sufficient economic justification (id. 1410) and the Chairman concurring with his colleagues finding no violation but only because the employer used its non-unit personnel and did not hire from the outside (id. 1408). The United States Court of Appeals for the Sixth Circuit summarily affirmed, *Ottawa Silica Co.* v. *NLRB* 482 F2d 945 (6th Cir., 1973).

Three months after the Board's decision in *Ottawa Silica*, the Board decided the instant case. Here the Chairman, while maintaining adherence to the principles of *Inland Trucking*, has adopted a "balancing" theory and has ignored the fact that the replacement workers in this case were hired from outside the plant and were not the employer's own non-unit personnel, the very fact which saved the employer in his opinion in *Ottawa Silica*.

In each subsequent decision of the Board, this inconsistent result continues. *Ozark Steel Fabricators*, 199 NLRB No. 136, 81 LRRM 1501 (1972); *WGN of Colorado, Inc.*, 199 NLRB No. 169, 81 LRRM 1369 (1972); *Ralston Purina Company*, 204 NLRB No. 43, 83 LRRM 1341 (1973); *Hess Oil Virgin Islands Corp.*, 205 NLRB No. 3, 83 LRRM 1529 (1973).

Thus, an irreconcilable division of the circuits exists with *Inland* holding the employer conduct to be *per se* violative of the act and Inter-Collegiate Press holding that it is justified by substantial and legitimate business consideration. An irreconcilable division of the Board exists with two members never finding a violation of the Act, absent anti-Union motivation, two members finding a *per se* violation of the Act, and the Chairman relying upon "flimsy" bases to justify a radical change in the national labor policy (B. 11).

The employer conduct here involved is inherently destructive of important employee rights. It deprives the employee of his "opportunity to earn without surrendering the correspond-

ing opportunity of the employer." *Inland Trucking Co.v.NLRB*, *supra*, F2d., at 564. It prevents the employee who desires to refrain from concerted activities from continuing to work as he would be allowed to do in a strike situation and gives this work to non-union replacements. This is "clearly discriminatory and in the nature of reprisal for Section 7 activities". *Oberer, Lockouts and the Law*, 51 Cornell L.Q. 193, 222 (1966).

The decisions of this Court in *American Shipbuilding Company* and *Brown* were limited to those peculiar factual situations. As pointed out above, the precise question in this case was reserved for future decision. In *Brown* the Court emphasized that the employer conduct was defensive in nature, was solely the result of an responsive to the union's whipsaw stratagem and found that the employer conduct served a substantial and legitimate business consideration in preserving the integrity of the multi-employer bargaining unit.

In the instant case the lockout was offensive in nature and the decision to commence the use of replacement workers was made only after the employer concluded that the lockout had failed (B. 22). Therefore, the Board majority's and the Circuit Court's reliance on *American Ship* and *Brown* is misplaced.

Unlike the employees in *NLRB* v. *Mackay Radio* and *Telegraph Co.*, 304 U.S. 33 (1938), these employees have not struck their employer and the employer is not replacing them because they refused to work. Rather throughout the course of this seven and a half month long lockout, these employees continued to request reinstatement on an unconditional basis. Unlike the employees in *Brown*, *supra*, these employees did not engage in a whipsaw strike, nor is their employer engaged in multi-employer bargaining or reacting to the Union's whipsaw stratagem; but, rather, these employees are faced with a choice of total capitulation to the employer's demand or the choice of a total loss of six month's income from their employer.

The conduct here *per se*, violates the Section 7 rights of the employees.

CONCLUSION.

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1573

Inter-Collegiate Press, Graphic Arts Division, etc.,

and

Sargent Welch Scientific Company,
Petitioners,

v.

National Labor Relations Board, et al.,
Respondents.

No. 72-1749

Bookbinders Local No. 60, International Brotherhood of Bookbinders, AFL-CIO,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petitions for Review of an Order of the National Labor Relations Board.

Submitted: September 10, 1973.

Filed: October 25, 1973.

Before GIBSON and BRIGHT, Circuit Judges, and SMITH, Senior District Judge.*

GIBSON, Circuit Judge.

Does the use of temporary replacements during a bargaining lockout constitute a violation of §§8(a)(1) or 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §151 et seq.?[1]

The contending parties[2] are sharply divided on this issue. The Union has contended throughout these proceedings for a *per se* rule forbidding the hiring of temporary replacements during an otherwise lawful lockout, the Company has viewed the practice as a legitimate economic weapon countering the union's right to strike, and a divided Board (3-2) shunned the *per se* approach in favor of an approach balancing the conflicting legitimate interests of both the employer and employee.

The Company was charged with violations of §§8(a)(1) and (3) for continuing to operate with temporary employees after instituting an otherwise lawful lockout. After a hearing, the administrative law judge concluded that he was bound by

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* The Honorable Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

1 This question was expressly left open by the Supreme Court in *American Ship Bldg.* v. *N.L.R.B.*, 300 U.S. 300, 308 n. 8 (1965):

> "[W]e intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help."

2 Petitions for review of the order of the NLRB were filed by Inter-Collegiate Press, Graphic Arts Division-Sargent Welch Scientific Company and Sargent Welch (hereinafter referred to in the singular as Company) and the Bookbinders Local No. 60, International Brotherhood of Bookbinders, AFL-CIO. The Union's petition was originally filed in the 7th Circuit and transferred by that Court to the 8th Circuit. The petitions were consolidated by us for hearing. Jurisdiction is established under §10(f) of the NLRA, as amended, 29 U.S.C. §160(f). Briefs *amicus curiae* were filed by the Chamber of Commerce of the United States urging affirmance and the International Union urging reversal.

the Board's decision in *Inland Trucking Co.*, 179 N.L.R.B. 350, 72 LRRM 1486 (1969), and found that the Company had violated the above sections by its use of temporary replacements. A majority of the Board disagreed and ordered the complaint dismissed. *Inter-Collegiate Press*, 199 N.L.R.B. No. 35 (1972).

While the Sixth Circuit has summarily dealt with this question and the Ninth Circuit referred to it in a different context, the Seventh Circuit is the only court that has previously articulated its views in passing upon this troublesome question. In *Inland Trucking Co.* v. *N.L.R.B.*, 440 F.2d 562, 565 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971),[3] the Seventh Circuit concluded:

> "that a lockout in the circumstances at bar, accompanied by continued operation with replacement labor, is per se, an interference with protected employee rights, and accordingly, per se, an unfair labor practice under §158(a)(1)."

If we were to accept this analysis, little more would need be said, for the mere use of temporary replacements would constitute a violation of the Act. However, the *Inland* opinion is conditioned on the "circumstances at bar," and the parties read that decision more or less expansively according to their interests. *Inland* supports the Union's position, but we do not think it conforms with the Supreme Court's opinions touching this issue and decide it would be improper for us at this time to adopt a ***per se*** rule. To do so would remove the development of the law in this

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[3] In *Ottawa Silica Co., Inc.* v. *N.L.R.B.*, —— F.2d —— (6th Cir. 1973) the court entered an order enforcing the Board's order in *Ottawa Silica Co.*, 197 N.L.R.B. No. 53, 80 LRRM 1404 (1972), wherein the Board found no violation of the Act in the use of temporary replacements during a lockout. In *N.L.R.B.* v. *Golden State Bottling Co.*, 401 F.2d 454, 457 (9th Cir. 1965), the court in dicta stated:

> "The legal course open to [the employer] was to hire temporary replacements for the locked out employees. *N.L.R.B.* v. *Brown*, 1965, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839."

Neither of these cases offer any discussion of the question and thus give little guidance in this case except to the extent they indicate a reluctance to adopt a *per se* rule as enunciated in *Inland Trucking*.

area from the special competence of the Board, which has been proceeding on a case-by-case basis to adjudicate the impact of hiring temporary replacements during a lawful lockout by balancing the interests of employees and employers and thereby fashioning a national body of labor law under the broad Congressional guidelines set forth in the Act. Before placing this court's imprimatur on any *per se* rule, it would seem advisable to heed the admonitions of the Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963):

> "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations' . . . . 'The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate a national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (citations omitted).

Our role as a reviewing court is to determine whether the Board's order is supported by substantial evidence on the record as a whole, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951), or has misapplied the law. *N.L.R.B.* v. *Insurance Agents*, 361 U.S. 477 (1960). Here the Board has chosen not to promulgate a *per se* rule, but rather to proceed on an individual case basis giving consideration to the special circumstances of each case. Admittedly, the conduct in question has some effect upon protected employee rights, but we are not prepared to say absolutely that a lockout plus the hiring of temporary replacements is conduct so "inherently destructive" of employee rights to warrant a reviewing court in promulgating a

per se rule when the Board itself has chosen not to do so. To the extent that *Inland Trucking* is interpreted as setting forth a *per se* rule, it has been criticized by commentators,[4] and to follow that path would seem to ignore the caution raised in *American Ship Bldg.* v. *N.L.R.B.*, 380 U.S. 300, 337-338 (1965) (Goldberg, J., concurring), that "the problem of lockouts requires 'an evolutionary process,' not 'a quick, definitive formula,' for its answer."[5] It was also unnecessary to the decision reached in *Inland* to announce a *per se* rule, since the court went on to find a lack of any legitimate and substantial business justification for the employer's conduct, which would warrant a finding of a violation of the Act under the test of *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

Since we deem a *per se* approach inappropriate, we think it important to relate in some detail the facts of this case. The Company prints scholastic year books and graduation announcements at its plant in Mission, Kansas. The Union represents all the full-time and permanent seasonal employees in the cover and bindery departments, and those in the announcement department, who perform paper cutting, finishing, and packaging work.[6] In February, 1967, the Union was recognized as the bargaining representative of the above employees. After seven months of negotiations in 1967 during which a two week strike occurred, agreement was reached between the Union and the Company on a collective bargaining contract that expired August 31, 1970.

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[4] Note, *Lockouts—Employers' Lockout with Temporary Replacements is an Unfair Labor Practice*, 85 Harv.L.Rev. 680, 683-85 (1972); Note, *An Offensive Lockout Accompanied by Continuous Operations with Temporary Replacement Labor is Per Se an Unfair Labor Practice*, 50 Tex.L.Rev. 552, 556-58 (1972).

[5] *See also Lane* v. *N.L.R.B.*, 418 F.2d 1208, 1209-10 (D.C.Cir. 1969), which indicates that the Supreme Court has suggested a modification of the approach in this area towards a balancing of the competing interests of labor and management.

[6] Other unions represent various other units of the Company's overall operations.

Negotiations on a new contract began July 7, 1970.[7] Fourteen bargaining sessions were held after this date until the Company lockout October 16th. It is uncontroverted that the Company and the Union were at impasse in their negotiations by October 15th, for on that date a federal mediator stated that further bargaining would be "an exercise in futility." The Company locked out all employees represented by the Union on October 16th, after being informed that morning that the Company's last contract proposal was unacceptable and the Union had no proposals to make. The last proposal offered provisions somewhat better than those in the expired contract.

The Union had been made aware as early as September 16th that the Company was considering a lockout, but no progress was made on any of the unresolved issues from that date until the date of the lockout. The parties and the Board are in agreement that the lockout was entirely legal at its inception.[8] No claim has been made that there was any bad faith on the part

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[7] Dates hereafter are in 1970 unless otherwise indicated.

[8] Lockouts have survived a tumultuous history. Prior to 1965 and the Supreme Court decisions in *N.L.R.B. v. Brown*, 380 U.S. 278 (1965) and *American Ship Bldg. v. N.L.R.B.*, 380 U.S. 300 (1965), the use of the lockout had been restricted by the Board to certain carefully defined circumstances. Lockouts to preserve the integrity of a multi-employer bargaining unit in the face of a "whipsaw" strike had first been found unlawful, *see Continental Baking Co.*, 104 N.L.R.B. 99 (1953), *enforcement denied*, 221 F.2d 427 (8th Cir. 1955); the Board then changed its view and upheld lockouts in these circumstances as reasonable defensive measures. *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954), *aff'd sub nom. N.L.R.B. v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957). However, it was unwilling to extend its holding to allow the use of temporary replacements to continue operations on the part of non-struck employers even if the struck member of the multi-employer group was operating with replacements. *Brown Food Store*, 137 N.L.R.B. 73 (1962). The Supreme Court's decision in *N.L.R.B. v. Brown, supra*, reversed the Board and settled the propriety of the use of temporary replacements to continue operations in these circumstances.

In cases involving single employers, the Board had evolved a rule that lockouts were only justifiable to safeguard against unusual operational problems or hazards, or economic loss if there were reasonable grounds for believing that a strike was threatened or imminent. *American Brake Shoe Co.*, 116 N.L.R.B. 820, *enforcement denied*, 244 F.2d 489 (7th Cir. 1957); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951); *International Shoe Co.*, 93 N.L.R.B. 907 (1951); *Duluth Bottling Assoc.*, 48 N.L.R.B. 1335 (1943). The mere desire

of the employer at the time the lockout began. The lockout failed to bring about any fruitful negotiations or agreements and effected no change in the Union's bargaining position. A substantial backlog of work had accumulated in the areas manned by locked out employees, and a failure to resolve the impasse before the Company's busy season would have prevented the Company from meeting its delivery schedules. Competitors were contacting Inter-Collegiate's customers and informing them that there would be late deliveries because of the labor dispute, and these customers were threatening to take their business elsewhere unless the Company could guarantee timely delivery. During the time when the Company's busy season was approaching, the Company's salesmen were warning of a substantial loss of customers and good will unless the labor dispute was resolved.

Inter-Collegiate is engaged in a highly seasonal business. It prepares yearbooks and announcements that must be delivered around the time of school graduations in May and June. The Company guarantees delivery of yearbooks 10 weeks after the complete school's copy is received and delivery of announcements six weeks prior to graduation exercises. Because of this delivery schedule, the Company has a peak period between February and June of each year, when it operates at over 100% of its plant's capacity (by use of overtime) and adds approxi-

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to support a legitimate bargaining position was not viewed as a sufficient justification for the use of a lockout. *Quaker State Oil Refining Corp.*, 121 N.L.R.B. 334 (1958); *American Ship Bldg.*, 142 N.L.R.B. 1362 (1963). The Supreme Court reversal of the Board's *American Ship* decision made clear that a lockout in support of a legitimate bargaining position, at least after impasse, is valid. *See*, Note, *The Unanswered Questions of American Ship*, 64 Mich.L.Rev. 910 (1966), which suggests a pre-impasse lockout would be unlawful; *but see N.L.R.B. v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962); *Lane v. N.L.R.B.*, 418 F.2d 1208 (D.C. Cir. 1960), which upheld the use of a pre-impasse lockout in support of a legitimate bargaining position.

The foregoing brief survey of decisions prior to *Brown* and *American Ship* illustrates both the complexity of the problem of lockouts in cases presented to the Board and the courts, and the importance of the *Brown* and *American Ship* decisions in the analysis of the problem presented to us for decision.

mately 300 seasonal employees to its permanent work force of 200. Approximately 66% of their yearbook volume and 98% of their announcement volume is shipped during this busy season. Any disruption has serious consequences for the Company's ability to meet its guaranteed delivery schedules. During the previous busy season the Company had been struck by a different union, and this strike disrupted deliveries and caused the cancellation of some contracts. Many customers who did not cancel their contracts after the late deliveries in 1970 had made it quite clear that they would do so if the situation recurred.

The Company believed, we feel with justification, that the Union's strategy was to continue negotiations, while working without a contract, into the busy season when a strike or threat of a strike would have left the Company with little choice but to meet the Union's demands. This had been the scenario for the other union's strike during the last busy season. The Company was justifiably concerned over the state of its business affairs in November, 1970, for it was necessary to begin production to reduce the backlog of work in preparation for its busy season and produce salesman's samples to aid in the solicitation of new business. If it ended the lockout, there was the very real possibility of a strike during the busy season when it would be too late to hire replacements; it being the Company's belief that at least two months would be required to train new employees for full production and that it could sustain substantial and permanent damage to its business if the Company failed to meet its delivery dates. The permanent loss of a number of its customers and consequent loss of good will appeared a likely possibility, since its business depended significantly on repetitive patronage.

The Company, therefore, on November 9th, offered to end the lockout if the Union would agree to a no-strike commitment for the coming busy season. The Union made a counter-proposal whereby it would agree to the no-strike commitment if the Com-

pany agreed to sign a contract acceptable to the Union by July 1, 1971. No agreement was reached by the parties. Thereafter, on November 23rd, the Company informed the Union that it would begin hiring temporary replacements unless a contract was signed or a no-strike commitment given by November 30. The Union and the employees were informed that the replacements were to be used only for the duration of the labor dispute, and in any event, their employment would not continue past June 21, 1971. The Company did hire replacements beginning November 30, resumed full production December 1, and continued the lockout until June 1, 1971, at which time the Company offered to reinstate all the locked out employees.

The evidence clearly indicates that the employer's use of the temporary replacements was motivated only by legitimate and substantial business reasons. We have carefully scrutinized the record and can find no indication that the employer's actions were motivated by any animus or hostility towards the Union or were undertaken to discourage its employees from the exercise of their collective bargaining rights.

The Company's petition in No. 72-1573 requests us to reverse the Board's finding that the Union was not on strike after November 9, 1970, the date that the employer *conditionally* offered to end the lockout. We think the finding of the Board on this issue is supported by substantial evidence on the record as a whole, and it will not be disturbed. As the Board found in favor of Inter-Collegiate on the unfair labor practice issue, this contention is apparently advanced as a means whereby we could avoid adjudication of the temporary replacement question, for if the Union were on strike, subsequent hiring of temporary or permanent replacements would not be violative of the Act.

The Company offered to end the lockout if the Union would oblige with a no-strike pledge during the busy season. The

Union countered with a proposal to do so contingent upon the Company agreeing to a contract acceptable by the Union by July 1, 1971. No agreement was reached. The locked out employees were willing since October 19th "to return to their employment on an unconditional basis." The Company's offer to end the lockout was not unconditional, and the Board's finding that the employees were not on strike is supported by substantial evidence on the whole record and must be affirmed by us.

We now turn to an analysis of the lockout with the delayed temporary replacement of employees as presented in No. 72-1749. We note first the argument of the Union that while a "defensive" lockout plus the hiring of temporary replacements may be upheld, *citing N.L.R.B.* v. *Brown*, 380 U.S. 278 (1965), an "offensive" lockout plus the hiring of temporary replacements is violative of §§8(a)(1) and (3) of the Act. We do not think a *pro forma* application of the labels "offensive" and "defensive" to a lockout assists in the analysis required to determine the legality of the conduct involved.[9] Board Chairman Miller in his concurrence in this case recognized the limited utility of using labels:

> "I am somewhat unsure as to the circumstances under which [a] court would regard a lockout as 'offensive' or 'defensive.' In fact, I am less sure that any such general labels are of real assistance in carrying out the kind of analysis which

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[9] As was stated in *Laclede Gas Co.* v. *N.L.R.B.*, 421 F.2d 610, 615 n. 11 (8th Cir. 1970):

> "Characterizing a lockout as 'defensive' or 'offensive' is a difficult task at best.
>
> * * * * *
>
> "'Moreover, and more important, whatever the determination in a particular case might be, the fact remains that the defensive lockout has its primary significance as an attempt to improve the employer's bargain. If that proposition be conceded * * * it undermines the basic distinction which the Board has sought to maintain in the lockout context—that is, the distinction between * * * [offensive and defensive lockouts].' Meltzer, Lockouts Under the LRMA, New Shadows on an Old Terrain, 28 U. Chi.L.Rev. 621 (1961)." Here it is the company advancing the distinction now apparently disfavored by the Board.

> the Supreme Court would have us undertake." 199 N.L.R.B. at ....

Eschewing the use of labels "offensive" or "defensive", we think the legality of an employer's conduct in a lockout should be determined by principles set out by the Supreme Court in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

Great Dane involved a claimed §8(a)(3) violation. However, *N.L.R.B.* v. *Fleetwood Trailers Co.*, 389 U.S. 375, 380 (1967), indicates that the above principles are applicable in determining whether a §8(a)(1) violation exists as well. The complaint in this case charges violations of both §8(a)(1) and §8(a)(3).[10]

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[10] Section 8(a) of the NLRA, 29 U.S.C. §158(a) provides:

> "158. Unfair labor practices
>
> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> • • • • •
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

If the employer's conduct is deemed "inherently destructive," it will be a violation of the Act under the first test in *Great Dane*. The phrase "inherently destructive" is not easily susceptible of precise definition. In *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17 (1954), the permanent discharge of workers because of participation in collective action was viewed as "inherently destructive." *Erie Resistor Corp.* v. *N.L.R.B.*, *supra*, found a super-seniority plan awarded to those working during a strike to be "inherently destructive." And dicta in *American Ship Bldg.* v. *N.L.R.B.*, 380 U.S. at 309, indicates that the Supreme Court would regard the permanent discharge of union members and their replacement with workers possessing violent anti-union animus to be "inherently destructive." We should not attempt to complete a catalog of actions that might be regarded as "inherently destructive," but rather must determine whether the conduct in this case should be so viewed. One commentator suggests that "inherently destructive" conduct is that which creates visible and continuing obstacles to the future exercise of employee rights.[11] The impact of a lockout, as recognized by another commentator, is more likely to be on the union's bargaining position than on the employees' allegiance to the union, at least where there is a history of bargaining relations between the parties.[12]

There has been no showing that the Union's position as bargaining agent was jeopardized or that it has suffered any dimunition in its capacity to effectively represent the employees in the bargaining unit. Although 15 employees did not return to work after the lockout ended, this was apparently because they had found other jobs. There is no indication that any of the union

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11 Note, 85 Harv.L.Rev., *supra* at 686.

12 Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U.Chi.L.Rev. 735, 751 (1951).

employees who did return has disavowed his union membership. The Board did not find the conduct here to be "inherently destructive," and we are not inclined to disturb this finding under the circumstances of this case.

The considerations which motivated the Court in *N.L.R.B.* v. *Brown*, 380 U.S. at 288-89, to conclude that the use of temporary replacements had a "comparatively slight" effect on employee rights are present here. First, the replacements were expressly hired only for the duration of the labor dispute, and a definite date was given for their termination even if the dispute was not resolved. This was communicated to both the union and the employees. Second, at all times the option was available to the employees to return to work by simply agreeing to the employer's terms, which were better than those in the old contract. Third, the employer had already agreed to continue in effect the union-security clause from the old contract.[13] Thus, we conclude that the employer's conduct did not have "unavoidable consequences . . . which he must have intended," *Erie Resistor, supra* at 228, and therefore was not "inherently destructive."

Conduct having even a "comparative slight" impact on employee rights may be a violation of §8(a)(3), unless the employer has established a legitimate and substantial business justification. *Great Dane, supra* at 34. Here the employer has established a legitimate and substantial business justification for his conduct, and there is no evidence of any unlawful motivation. We therefore agree with the Board that no §8(a)(3) violation has been proved.

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13 Although the effective date would be deferred until Kansas law approved of such agreements, this indicates to some extent the employer's recognition of the union as an economic fact of life and further supports the conclusion that no anti-union animus was present here.

The Union argues that the conduct here is violative of §8 (a)(1) because of the coercion inherent when the employees are deprived of their income while the company continues to operate. This consideration was of importance to the court in *Inland Trucking*:

> "Such lockout forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer's ability to withstand a shutdown of its business against the employees' ability to endure the cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation."

440 F.2d at 564.

We recognize that there is coercion present when the employer locks out his employees, and it may be magnified when the employer continues operations with temporary employees.[14] The coercion, however, is to force acceptance of the employer's bargaining proposals, not to deter employees from the exercise of their rights. As recognized in *American Ship Bldg., supra* at 309:

> "Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful."

---

[14] We note in passing that the returns of continued operation with temporary employees may not be such as to lead most employers to take such a step. There was evidence in this case that Inter-Collegiate lost approximately $120,000 as a direct result of using temporary employees. In addition, replacements for highly skilled jobs may be hard to locate, or the cost of training replacements merely for the duration of a labor dispute may be prohibitively high. In view of the above and the fact that the employer will have to prove legitimate and substantial business justification for his conduct, it is unlikely an employer would hire temporary replacements during an otherwise lawful lockout unless motivated by business exigencies. *See* Note, 50 Tex. L.Rev., *supra* at 555; Note, 85 Harv.L.Rev., *supra* at 684.

It must be conceded that the use of a lockout in support of a legitimate bargaining position is not inconsistent with the right to bargain collectively or the right to strike. *American Ship Bldg., supra* at 310. The hiring of temporary replacements does no more than increase the pressure upon the employees to settle the dispute, while perhaps easing the pressure on the employer. Such pressure is surely no greater than that caused by stockpiling and subcontracting, *American Ship Bldg., supra* at 316, or the shifting of production to other plants during the lockout, *Ruberoid Corp.*, 167 N.L.R.B. 987 (1967), which have been found lawful during a bargaining lockout.

> "[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. . . . Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them."

N.L.R.B. v. *Insurance Agents*, 361 U.S. at 495-96.

The Chamber of Commerce of the United States in an *amicus curiae* brief filed in this case argues that a lockout is the corollary of the union's right to strike, *citing Morand Bros. Beverage Co.* v. *N.L.R.B.*, 190 F.2d 576, 582 (7th Cir. 1953). A lockout could be viewed as the employer's ultimate economic weapon akin to the worker's right to strike, but this proposition, even if correct, does not determine the question of the permissible scope of the lockout. The Supreme Court in *N.L.R.B.* v. *Truck Drivers Union Local No. 449*, 353 U.S. 87, 93 n.19 (1957), in determining whether a lockout was permissible, found it unnecessary to pass upon whether the lockout is the corollary of the union's right to strike. In *American Ship Bldg., supra* at 315, in finding a bargaining lockout permissible, the Court indicated that the

permissible scope of a lockout is a question ultimately resolved by an analysis of §§8(a)(1) and (3).

Neither the Board nor the courts should sit as arbiters of the permissible economic weapons available to the parties in a labor dispute. Instead, the Board's function in carrying out the policy of the Act must be to determine whether the conduct engaged in violates any provision of the Act. Here, since no antiunion animus or hostile motivation has been shown and the employer has established a legitimate and substantial business justification, we agree with the Board that there is no §8(a)(1) violation merely because the Company may have increased the economic pressure on the Union by continued operation with temporary replacements. To find otherwise would be taking upon ourselves a general authority to assess the bargaining power of the parties to a dispute and to attempt to redress what we might perceive to be a relative imbalance in bargaining power by finding a violation of §8(a)(1). Such a method of decision has been denied even to the Board. *American Ship Bldg.*, 380 U.S. at 317. The balancing of bargaining power denied to the Board must be contrasted with the Board's authority to balance "conflicting legitimate interests." *Erie Resistor, supra* at 236. This is what the Board has done in this case.

Finding no violation of §§8(a)(1) or (3) in the facts of this case, we affirm the Board's dismissal of the complaint.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTER COLLEGIATE PRESS, GRAPHIC
ARTS DIVISION - SARGENT WELCH
SCIENTIFIC CO. AND SARGENT WELCH
SCIENTIFIC CO.

and

BOOKBINDERS LOCAL NO. 60,
INTERNATIONAL BROTHERHOOD OF
BOOKBINDERS, AFL--CIO

Cases 17--CA--4498
17--CA--4762
17--CA--4826

DECISION AND ORDER

On February 9, 1972, Administrative Law Judge 1/ Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs, the General Counsel filed cross-exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision in Cases 17--CA--4762 and 17--CA--4826.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by hiring temporary replacements for the employees whom it had lawfully locked out, but did not

1/ The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

violate the Act by its brief layoff of three permanent employees shortly after the end of the lockout while temporary employees were performing unit work, and did not unlawfully impose more onerous working conditions on two of those permanent employees after their recall. The undersigned members adopt the Administrative Law Judge's recommendation to dismiss as to the post-lockout layoff and the alleged imposition of more onerous working conditions, but do not agree with his conclusions as to the hiring of temporary replacements during the lockout.

Rather, we find, for the reasons stated in our opinion in Ottawa Silica Co., 197 NLRB No. 53, that, absent antiunion motivation, which is not shown here, an employer does not violate Section 8(a)(3) or 8(a)(1) of the Act by hiring temporary replacements to continue operations during an otherwise lawful lockout. Accordingly, as a majority of the Board is of the view that no violation of the Act has occurred, we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. SEP 20 1972

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN MILLER, concurring:

Once again we face the question of whether or not the utilization of temporary replacements by an employer who engages in a lockout constitutes a violation of our Act. Two of my colleagues appear to be of the view that the use of such replacements always creates a violation of the Act whereas another two of my colleagues appear to be of the view that it never creates a violation, assuming that the lockout itself is proper.

As indicated by my separate concurring opinion in Ottawa Silica Company, 197 NLRB No. 53, I find myself unable to accept either unequivocal view.

The Supreme Court, it will be recalled, issued its decisions in N.L.R.B. v. Brown, et al. d/b/a Brown Food Stores, 380 U.S. 278 (1965), and in American Ship Building Co. v. N.L.R.B., 380 U.S. 300 (1965), on the same day. In American Ship Building Co. the Court upbraided the Board for attempting to determine the legality of a lockout in any given case by assessing the relative economic power of the adversaries in the bargaining process. Instead of using such a test, a majority of the Court held foursquare that "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position."

As to the issue of the use of temporary replacements, however, the opinion of the Court in Brown appears to me to both permit and require this Board to engage in just the sort of balancing of interests in which it forbade us to engage in determining the legality of a lockout as such.

For in the Brown case, where, unlike American Ship Building, the issue of the utilization of temporary replacements was before the Court, the Court appears to have separated the issue of the legality of the lockout from the issue of legality of the use of replacements. It gave little attention to the legality of the lockout in that case, noting that in American Ship Building it had held "that a lockout is not an unfair labor practice simply because used by an employer to bring pressure to bear in support of his bargaining position after an impasse in bargaining negotiations has been reached," N.L.R.B. v. Brown Food Stores, 380 U.S. 278, 284. But when the Court turned to the issue of the use of temporary replacements, it engaged in a lengthy discussion, balancing the impact of such conduct by the Respondents on possible discouragement of union membership against the importance and the legitimacy of the objectives of the employer. In the course of this discussion the Court stated at 289:

> When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent.2/

In evaluating the probable effect of the use of temporary replacements on union membership, the Court noted, as minimizing factors, that (1) the replacements were expressly used for the duration of the labor dispute only, (2) the membership, through its control of union policy, could end the dispute and terminate the lockout at any time simply by agreeing to the employer's terms and returning to work on a regular basis, and (3) the employer had agreed to incorporate a union-shop provision in the new contract.

2/ This same principle was subsequently further elaborated upon by the Supreme Court in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

Then, in evaluating the legitimacy or illegitimacy of the employers' interests in resorting to the use of temporary replacements, the Court pointed to the lack of evidence of any antiunion animus, to the amicable history of labor relations between the employers and the union, and again to the temporary nature of the replacements. It concluded that all of these factors indicated an absence of improper motive. With respect to affirmative evidence of a legitimate business purpose, the Court appears to have given great weight to the legitimacy of the Respondents' desire to maintain the integrity of, and the resultant increased bargaining strength afforded by, a unified multiemployer unit.

If I understand the reasoning of the majority opinion of the Supreme Court in the Brown case, therefore, it is incumbent upon this Board in each case involving the use of temporary replacements during an otherwise legitimate lockout to: (1) weigh carefully all of the circumstances in order to determine the extent to which the use of such replacements has a tendency to discourage union membership, and (2) balance against our conclusions in that regard the extent to which the use of such replacements was supported by a legitimate and significant business justification or, on the other hand, the extent to which antiunion animus rather than bona fide business considerations motivated the employer's decision to utilize replacements.

It was for these reasons that in my separate concurring opinion in the Ottawa Silica case I found no violation under the facts of that case, but at the same time disclaimed what appeared to be the view of two of my colleagues that the utilization of temporary replacements would be justified in all otherwise permissible lockout situations.

While there is some language in the opinion of the Court of Appeals for the Seventh Circuit in Inland Trucking Co. et al. d/b/a Oshkosh Ready Mix Co., et al., 440 F. 2d 562 (1971), cert. denied 404 U.S. 858 (1971), which might be read as outlawing

the use of temporary replacements as a per se interference with protected employees' rights, such a holding would be directly contrary to Brown. I therefore read the Inland opinion to mean only that the use of such replacements under the circumstances there at bar constituted, in the court's view, such an improper interference. At any rate, in the latter part of the court's opinion in Inland, it clearly engaged in a balancing analysis and there concluded, as had the Board, that there was insufficient evidence of legitimate and substantial business justification for the Respondent's insistence upon continued operation during what the Court there referred to as an "offensive lockout."

I am somewhat unsure as to the circumstances under which that court would regard a lockout as "offensive" or "defensive." In fact, I am less than sure that any such general labels are of real assistance in carrying out the kind of analysis which the Supreme Court would have us undertake.

In the instant case, I have searched the record and am unable to detect any evidence that the use of temporary replacements here had any greater tendency to discourage union membership than did like conduct in the Brown case. Here, as there, Respondent made abundantly clear throughout that the replacements were to be used for the duration of the labor dispute only. Indeed, Respondent gave even greater assurances here, in that it offered to abandon both the lockout and the continued use of the temporary help if the Union would only give some assurance of its intent not to disrupt continued production by the invocation of its strike weapon. Secondly, here, as in Brown, at the time of the lockout the Employer had already offered terms and conditions of employment of greater advantage to the employees than those which had prevailed under the expired contract, and left available to the Union and the employees the same option emphasized by the court in Brown---i.e., to agree to

return to work on a regular basis under an improved contract. Finally, here, as there, the Employer had agreed that a union-security clause would be incorporated in its new proposed agreement.[3/]

Turning then to an analysis of Respondent's legitimate or illegitimate objectives and business justifications, we have once again, as in Brown, every indication of an established, stable bargaining situation. While here it is clear that past negotiations had not always been consummated without resorting to the use of economic weapons, it is equally clear that Respondent fully accepted the Union's representative status, and had at no time attempted to evade its obligations to deal in good faith with its employees' chosen exclusive bargaining agents. The entire course of events also evidences that Respondent's only purpose was to attempt to retain its competitive position, which it felt would be seriously jeopardized by the economic effects of a strike during a crucial production period for the second consecutive year.

While it is true that, unlike Brown, Respondent was not seeking to preserve the integrity of a multiemployer bargaining unit, one must ask whether this makes any significant difference in the analysis. The term "preserving the integrity of a bargaining unit" may have a euphoric sound, but the realistic fact is that the real meaning of preserving that integrity is the maintenance of maximum employer economic strength in dealing with a union across the bargaining table. A multiemployer bargaining unit has no inherent social value, and the legitimate interest of the employer in Brown Food Stores was not the preservation of some ultimate social good, but purely and simply was the interest in maintaining, along with other relatively small employers, the added economic muscle supplied by their joint action. I see,

3/ I regard the clause as in some measure probative of Respondent's lack of union animus even though the effective date of the clause would have been deferred pursuant to Kansas law.

therefore, no basis for deciding that the instant Employer's interest in maintaining its economic viability was any less justifiable a business consideration than the desire of Brown Food Stores to maximize its economic strength in bargaining by maintaining a solid bargaining front with other companies in its industry.

Viewing, then, the economic justifications established in this record, I am satisfied that the record demonstrates their economic importance to Respondent and affirms Respondent's bona fides in pursuing its economic interests. This is not a case in which those justifications are asserted as a pretext, nor do I find any evidence that the Respondent intended its utilization of temporary replacements as any kind of a "scare" measure which had as its real design an attempt to force its employees out of the Union and into a course of future dealing which would eliminate the Union as their representative.

As a matter of fact, this record further indicates that Respondent found that the use of temporary replacements was not a satisfactory means of achieving continuity of high quality production and has renounced any intent to utilize such a route in the future, because it has proved to be inconsistent with the exercise of good business judgment. This is added evidence, if any were needed, that Respondent's ends were related solely to economic considerations.

Thus an evaluation of the circumstances of this case in the light of the Brown tests demonstrates that here, as in Brown, "not only is there absent in the record any independent evidence of improper motive, but the record contains positive

evidence of the employers' good faith." Thus I conclude that the evidence does not support any finding that Respondent's conduct here violated Section 8(a)(3) of our Act.

For these reasons I join Members Kennedy and Penello in dismissing the complaint herein.

Dated, Washington, D.C.

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

Members Fanning and Jenkins, concurring in part and dissenting in part:

Contrary to our three colleagues, we would for the reasons stated by the Administrative Law Judge, in accord with our opinion in Ottawa Silica, supra, affirm the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by operating its plant with replacements for its locked-out employees from November 30, 1970, to June 1, 1971.[4/]

As we pointed out in Ottawa Silica, Chairman Miller constitutes with us a Board majority for the proposition that the Circuit Court's decision in Inland Trucking, supra, sets forth the tests for determining the legal propriety of a lockout and concomitant operation with replacements, namely, (1) where such conduct is inherently destructive of protected employee rights no proof of anti-union motivation is required even if the employer introduces evidence that the conduct was motivated by business considerations, and (2) where the adverse impact on employee right is "comparatively slight" an anti-union motivation must be proved if the employer has come forward with evidence of legitimate and substantial justification therefor.[5/]

Applying the first test to the instant case, we would find in line with the court's reasoning in Inland Trucking that Respondent's use of replacements recruited from outside sources for a prolonged seven-month period was inherently destructive of the rights of its regular employee and therefore violative of Section 8(a)(1) and (3) without regard to any claim that such evidence was motivated by business considerations. As the court stated:

4/ However, we agree with our colleagues in their adoption of the Administrative Law Judge's dismissal of unfair labor practice allegations with respect to Respondent's post-lockout layoff of certain recalled employees.

5/ See also N.L.R.B. v. Great Dane Trailers, 388 U.S. at 34.

> We conclude that the bargaining lockout, which was held in American Ship not to be inconsistent with protected employee rights, does become so if the employer does not shut down, but continues operations with temporary replacements. Such lockout forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer's ability to withstand a shutdown of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but in addition, to watch other workers enjoy the earning opportunities which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and content of that right, as protected in 29 U.S.C. § 157. [Inland Trucking Co., supra at 564.]

However, even if the second test is applied, it is clear from the record that Respondent has not succeeded in presenting evidence of legitimate and substantial business justification for its continued operation during the lockout. In this connection, the Administrative Law Judge found no merit in Respondent's contention that its use of replacements was "a defense measure to protect itself from a well-grounded fear" of a strike during the busy season.[6/] In so holding, the Administrative Law Judge properly found that such a fear on the part of Respondent was "unreasonable" and "more subjective than objective" in view of the "complete absence of any indication that the [Union] threatened by word or deed to strike to achieve its bargaining ends."

Although, as noted above, Chairman Miller here, as in his Ottawa Silica concurrence, reiterates his adherence to Inland Trucking principles, he once more fails to take cognizance of the court's rationale concerning the inherently destructive character of the conduct in which the Respondent engaged. In addition, Chairman Miller's statement that Respondent had a business justification for operating with replacements rests on the flimsy basis that Respondent "felt [it] would be seriously jeopardized by the economic effects of a strike" during the busy season. As the Administrative Law Judge correctly concluded, Respondent's

6/ From about the first of February to the latter part of June.

fear of a strike was without foundation as the record is devoid of any evidence that the Union threatened to strike in the event Respondent terminated its lockout and recalled its regular employees. In the absence of any "explicit objective indication" of the Union's intention to strike, it is our judgment that Respondent's "subjective" fear of such an occurrence does not constitute a reasonable justification for concluding that a strike would have occurred had Respondent recalled the locked-out employees. Nor does it show that Respondent would have been seriously jeopardized if it had resumed production with the locked-out employees who notified Respondent of "their desire to return to their employment on an unconditional basis," even if one assumes, arguendo, that its fears of a strike were well grounded. Entirely apart from the fact that Respondent could have assured itself of a strike-free season by assuring the Union that it would negotiate a satisfactory collective-bargaining agreement by the end of the season, Respondent has introduced no evidence that it would not have been able to hire replacements in the event of a strike. The record demonstrates that Respondent notified the Union on November 23 of its intention to resume operations on November 30, that after unsuccessful negotiations with the Union in an effort to obtain a no-strike commitment from the Union it began hiring replacements and recalling temporary seasonal employees on November 30, and that full production in the locked-out departments resumed on December 1. Respondent has not come forward with any evidence suggesting why it would have been unable similarly to hire replacements for striking employees. Logic and experience strongly suggest that workers who are willing to take the jobs of locked-out employees will as willingly take the jobs of striking employees. Accordingly, we conclude that though Respondent no doubt had substantial and compelling reasons for resuming

production, it has failed to demonstrate any business justification for discriminating against unit employees in resuming operations. 1/

Finally, Chairman Miller errs in relying on the Supreme Court's decision in Brown Food Stores, supra, which clearly does not govern the instant proceeding because it was a special case involving a defense response to a situation precipitated by a whipsaw strike. As we observed in Ottawa Silica with respect to a similar misinterpretation on the part of Members Kennedy and Penello, the Supreme Court was fully aware of Brown Food Stores when it explicitly stated in American Ship Building, supra, that it was limiting its holding to a classic lockout situation and was expressing no view as to the legality of continued operation with replacements of locked-out employees.

We now address ourselves to the opinion of Members Kennedy and Penello who find that Respondent did not violate the Act by hiring temporary replacements to continue operation during the lockout. Although they gave some minimal recognition in Ottawa Silica to the business justification criterion of Inland Trucking, they now make no reference to that test which they have apparently abandoned in the instant case. As Chairman Miller states in his concurrence herein, Members Kennedy and Penello "appear to be of the view that it [the use of temporary replacements for locked-out employees] never creates a violation, assuming that the lockout itself is proper." Thus, by their complete disavowal of both Inland Trucking criteria, which are in turn set forth by the Supreme Court in Great Dane Trailers, Members Kennedy and Penello fall into an entirely untenable legal posture.

1/ It is of course clear that Respondent discriminated against employees who were represented by the Union in selecting employees to work when it resumed operations. This discrimination was demonstrated not only by the failure to recall the locked-out employees but by Respondent's recall of temporary seasonal employees and the immediate lockout of those among them who would have become part of the bargaining unit had Respondent allowed them to begin their third season of work.

As we believe that Respondent's conduct was destructive of protected employee rights and that, in the absence of any objective indication of the Union's intention to strike, Respondent did not have a legitimate and substantial business justification for its conduct, we would find that Respondent violated the Act.

Dated, Washington, D.C.

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

TXD--40--72
Mission, Kans.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

INTER COLLEGIATE PRESS, GRAPHIC ARTS DIVISION---SARGENT WELCH SCIENTIFIC CO. AND SARGENT WELCH SCIENTIFIC CO.

and

BOOKBINDERS LOCAL NO. 60, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS(AFL--CIO)

Cases 17--CA--4498
17--CA--4762
17--CA--4826

David A. Nixon, Esq., for the General Counsel.
Earl J. Engle, Esq., and John Bastor, Esq., of Kansas City, Mo., for Respondent.
William O. Eisler, Esq., and Mr. Meryl A. Cooper, of Kansas City, Mo., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

BENJAMIN K. BLACKBURN, Trial Examiner: The charge in Case 17--CA--4498 was filed on November 23, 1970; the complaint was issued on June 10, 1971. The charge in Case 17--CA--4762 was filed on July 14, 1971; the complaint was issued on September 27, 1971. The charge in Case 17--CA--4826 was filed on September 7, 1971; the complaint was issued on November 2, 1971. The three cases were consolidated for hearing on November 4, 1971. The hearing was held in Kansas City, Missouri, on November 16, 17, 18, 19, and 30 and December 1 and 2, 1971.(The motions of the General Counsel and Respondent to correct the transcript are hereby granted.) The issue in Case 17--CA--4498 is whether Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, when it hired temporary replacements for its locked-out employees on and

after November 30, 1970. The issue in Case 17--CA--4762 is whether Respondent violated Section 8(a)(1), (3), and (5) of the Act when it assigned certain work on June 24 and 25, 1971, to a temporary replacement rather than to Irene Barnes, Mary Alice Helm, or Ruby Patterson, employees who had been locked out and who were on layoff on those two days. The issue in Case 17--CA--4826 is whether Respondent violated Section 8(a)(1), (3), and (4) of the Act by transferring Irene Barnes and Mary Alice Helm on September 2 and 3, 1971, to jobs that were more onerous and demanding than their usual assignments. For the reasons set forth below, I find for the General Counsel in Case 17--CA--4498 and for Respondent in Cases 17--CA--4762 and 4826.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of oral argument and briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, an Illinois corporation, operates a printing plant in Mission, Kansas, where it manufactures and sells graduation announcements and yearbooks to colleges, universities, high schools, and junior high schools and manufactures and sells other printed products. Goods and materials purchased for more than $50,000 are annually received at the Mission plant from suppliers located outside the State of Kansas. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. Case 17--CA--4498

1. Background

Inter Collegiate Press, the Mission, Kansas, plant involved in this proceeding, is one of three which together comprise the Graphic Arts Division of Sargent Welch Scientific Co. Donald Tyler is general manager of the Graphic Arts Division. Inter Collegiate's principal products are yearbooks and announcements. To that end, its production factilities are organized into an order entry department, a yearbook department, and an announcements department. Production in the yearbook department begins when Respondent receives from a school its initial yearbook specifications, including pictures, art work, and copy. The order goes first to the mat receiving department, next to the composition department where type is set. Then the pages proceed through the camera area,

followed by the stripping and platemaking areas where lithographic preparatory work is performed. The plates go to the lithographic pressroom where the actual printing operation occurs. No employees represented by the Charging Party are involved in any of these operations. While they are taking place, yearbook covers are being manufactured in the cover department. The Charging Party represents all full-time and permanent seasonal employees in the cover department. (Respondent also employs temporary seasonal employees. An individual advances from temporary seasonal to permanent seasonal status, i.e., he moves into the bargaining unit represented by the Charging Party, at the beginning of his third season of employment.) Finally, the printed material and the covers come together in the bindery department where the yearbook is completed and where the Charging Party represents all full-time and permanent seasonal employees.

Production in the announcements department begins when paper is cut to specifications by employees represented by the Charging Party. Like yearbook pages, the announcements and other graduation accessory items are printed by employees who are not represented by the Charging Party. They then move into the announcement assembly area where they are finished, folded, inspected, and packaged by employees who, provided they enjoy full-time or permanent seasonal status, are represented by the Charging Party.

Because the great bulk of its products must be delivered during or just before the school graduation season in June each year, Respondent's production peaks in the first half of each year. Its season, in the sense of the period during which it is utilizing its facilities at their maximum capacities so that it cannot increase its production by adding employees or increasing overtime, runs from around the first of February until the latter part of June. During this part of the year the complement of employees at Inter Collegiate Press grows, through the hiring of seasonal employees, from something over 200 to more than 500.

Respondent markets its products through salesmen scattered throughout the United States and Canada. It annually holds a regional sales meeting in Washington, D.C., in mid-December and another in Kansas City in mid-January. It furnishes its salesmen with various samples and other promotional material for their use in persuading the schools on which they call to deal with Respondent rather than one of its competitors who, along with Respondent, compete aggressively for the market. Respondent also furnishes kits to the schools which have entered into yearbook contracts with it to assist editors in preparing their copy. Materials for salesmen and editors are manufactured at the Inter Collegiate Press plant and, because of the seasonal nature of the business, must be ready at approximately the same time each year.

Because of the nature of the products, time of delivery is of the essence in contracts which Respondent enters into with schools. (Respondent guarantees delivery of yearbooks 10 weeks after receipt of final copy from the customer. With respect to announcements, delivery is guaranteed in 6 weeks.)

The labor relations history of Inter Collegiate Press began in 1963 when District 50, United Mine Workers of America, filed a petition in Case 17--RC--4163 for an election in a unit of production and maintenance employees. The case went to the Board on the issue of whether, as Respondent contended, temporary seasonal employees should be excluded from the unit. On October 25, 1963, the Board ruled that they should. An election was held on November 15, 1963. On November 20, District 50 filed objections. On February 11, 1964, the Regional Director set the election aside and ordered a second one. It was held on March 4, 1964. The vote was 117 to 89 against District 50.

In December 1965 Lithographers and Photoengravers International Union, AFL--CIO, filed a petition in Case 17--RC--4942 for an election in a unit of lithographic production employees. Once again, the temporary seasonal employees issue sent the case to the Board. On April 15, 1966, the Board ruled that they should be excluded from the unit. LPIU won the election which followed this decision. It was certified on May 12, 1966.

On December 12, 1966, two unions filed petitions for elections. In Case 17--RC--5264, Kansas City Printing Pressmen and Assistants Union, Local 16, sought an election in a unit of letter pressmen, steel die pressmen, and assistants. In Case 17--RC--5263, the Charging Party sought an election in a unit of bindery employees. Both petitions specified that temporary seasonal employees would be excluded. Consent elections were held on February 23, 1967. Both unions prevailed. Both were duly certified.

The first contract between Respondent and LPIU ran from January 26, 1967, through September 30, 1969. It was negotiated without strike activity. The first agreement between Respondent and the Printing Pressmen was also negotiated without a strike. It expired June 30, 1971. Respondent and the Printing Pressmen reached agreement on a second contract on July 19, 1971, without a strike. The first contract between Respondent and the Charging Party ran from September 1, 1967, through August 31, 1970. During the negotiations, which lasted from March until October 1967, the Charging Party struck Respondent for approximately 2 weeks in late August or early September. The Charging Party struck over such issues as work by supervisors, manning, hours, voluntary work on Memorial Day holiday, and wage increases. It ended its strike

without prevailing on these issues. The contract to which it eventually agreed did not contain all that the Charging Party had sought by striking with respect to these items.

Respondent and LPIU began negotiations for a second contract in September 1969. During those negotiations the events took place which are recorded in Inter Collegiate Press, Division Sargent [sic] Welch Scientific Co., 194 NLRB No. 60. (Respondent was found not to have violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of LPIU as the bargaining representative of its lithographic production employees.) LPIU struck on March 6, 1970, and picketed the Inter Collegiate Press plant. Employees in the units represented by the Printing Pressmen and the Charging Party refused to cross the picket line. It was removed on the evening of March 10, 1970. Employees represented by the Printing Pressmen and the Charging Party returned to work the next morning. On March 9 or March 10 Respondent threatened to file suit for an injunction against the Charging Party if it did not immediately honor the no-strike clause in its contract with Respondent by instructing the employees it represented to cross LPIU's picket line. No suit for an injunction was ever filed against the Charging Party.

Negotiations for a second contract between Respondent and the Charging Party began with a meeting on July 7, 1970. Subsequent meetings were held in 1970 on July 27 and 30, August 6, 7, 17, 24, and 27, September 9, 15, 16, 17, and 28, October 15, 16, and 26, November 9, 18, and 23, and December 22; in 1971 on February 1, March 2, April 6, and November 9. No agreement has yet been reached. As of November 30, 1971, the day on which Tyler finished testifying in this proceeding, he had decided not to resort to a lockout during or in support of Respondent's 1972 season. His reason was that the lockout in support of the 1971 season (see below) had not solved Respondent's problems. Since I have received no information to the contrary in the interim, I assume that no lockout or strike has taken place between the close of the hearing and this decision, which comes during Respondent's 1972 season. Respondent and the Charging Party agree that they are under a continuing duty to bargain with respect to employees in the unit for which Charging Party was certified on March 3, 1967; namely, all full-time and permanent seasonal bookbinders, excluding temporary seasonal employees, home workers, office and clerical employees and all other employees, guards and supervisors as defined in the Act. (Except for the period of the lockout, Respondent has continued and is continuing to check off dues for the Charging Party according to their expired contract.)

2. The lockout

The same issues for which the Charging Party had fought and lost in 1967, namely, work by supervisors, manning (i.e., which employees in which job classifications would be permitted to setup and/or

operate which equipment in the plant), hours, whether employees could be compelled to work on Memorial Day, and wage increases, came up early in the 1970 negotiations. As the Charging Party pressed each of its demands in these and other areas, Respondent's spokesman (Tom Barr, personnel director of the Company, prior to August 17; Earl Engle, Respondent's counsel, at the August 17 meeting and thereafter) stated that it was a strike issue, i.e., that it was a demand to which Respondent was so strongly opposed that it would take a strike rather than agree. At no time in the negotiations did the Charging Party (in the person of its spokesman, Merrel Cooper, the Charging Party's secretary-treasurer and business representative) say that it intended to strike. On the other hand, at no time prior to the meeting of March 2, 1971, did the Charging Party say that it did not intend to strike in an effort to win its demands. (This is the only significant credibility issue posed in the record. I do not credit the testimony of Terry Randel, an employee-member of the Charging Party's bargaining committee, that Cooper more than once responded to Respondent's "that's a strike issue" argument with a statement that the Charging Party did not intend to strike, especially in the early stages of the negotiations. I do so principally because Cooper himself, in the course of a searching cross-examination by Engle, was finally unwilling to go that far. Moreover, Engle, who testified to the contrary as a witness for Respondent, impressed me with his candor. My findings as to the details of what happened during the negotiations and how Respondent arrived at the decisions it made are based primarily on his testimony.)

When Engle entered the negotiations on August 17, 1970, 42 issues were still on the table. Only 13 were resolved prior to October 16, 1970. No issues were settled between September 15, 1970, and April 6, 1971. At the September 17, 1970, meeting the Charging Party made a wage proposal which Respondent rejected. At the September 28, 1970, meeting Respondent made a final proposal to resolve all outstanding issues. The Charging Party rejected it on October 15, 1970. At that meeting, a Federal mediator stated that Respondent and the Charging Party were engaged in an exercise in futility. Engle and Cooper agreed that negotiations had reached a deadlock. (Respondent raised the possibility of breaking the impasse by changing job classifications at the meeting held on November 9, 1970. However, at the November 23, 1970, meeting the Charging Party rejected this feeler.)

When the negotiations failed to progress to its satisfaction, Respondent considered the strategy of bringing pressure on the Charging Party by locking out the employees it represented in the hope it would lead to agreement on the basis of Respondent's terms. Engle first mentioned the possibility of a lockout to Cooper at the conclusion of the September 16, 1970, meeting. Tyler, who did not participate in the negotiations, discussed the situation with

Engle after the meeting of October 15, 1970. He decided, as Engle recommended, that, in the event the meeting scheduled for the next day did not result in some change in the situation, Respondent would lock out at the end of the day shift on October 16, 1970. Consequently, near the end of the October 16 session, which began with Cooper's statement that he did not know why the parties were meeting because Respondent's final proposal was unacceptable to the Charging Party and the Charging Party had nothing further to present, and which again proved fruitless, Engle announced Respondent had decided to lock out at 3:30 p.m. in support of its bargaining position. He said Respondent would not resume work in the bindery areas until it had a signed contract and he said Respondent was locking out all employees represented by the Charging Party. Respondent announced the decision to its employees in several notices which it distributed to employees on October 16. All accurately reflect Respondent's view of the situation as it existed at that time and truthfully set forth Respondent's reason for resorting to a lockout. The one distributed to all employees in the "Bindery, Announcement Assembly and Cover Departments" is typical. It reads:

> To date the Company has been unable to reach agreement with the Bookbinders Union Local #60, your bargaining agent. In my judgment, the Union's demands far exceed the Company's financial ability to pay. On several occasions the Company has offered your Union the opportunity to audit its books. Your Union has refused these offers.
>
> The Company feels that negotiations with your Union are extremely critical. It is imperative that the Company has a signed contract with your Union before the busy season. If the Company does not have a signed contract, it will not be in a position to guarantee delivery to customers on a timely basis. The progress in negotiations to date indicate to me that your Union intends to wait until the busy season to take affirmative action in support of its bargaining demands. The Company will not allow this to happen.
>
> Therefore, effective October 16, 1970 at 3:30 P.M. the Company will cease production in the Bindery, Announcement Assembly and Cover departments until such time as it has a signed contract with the Bookbinders Union. There will be no further work for you until such a contract is executed.
>
> /s/ D. A. Tyler
>
> D. A. Tyler
> General Manager
> INTER-COLLEGIATE PRESS

The lockout began as scheduled at 3:30 p.m. on October 16, 1970. It lasted through May 30, 1971. The Charging Party put up a picket line at the Inter Collegiate Press plant when the lockout began. It removed it when the lockout ended. The picket signs read, "Inter-Collegiate Press Unfair Bookbinders Local No. 60 Lockout."

On October 19, 1970, Cooper sent Tyler a letter which reads, in pertinent part, "On behalf of the Bindery Unit employees at your company, who have been locked-out, you are hereby notified that each and every one of them hereby request to return to their employment on an unconditional basis." The Charging Party never withdrew or modified this request.

By early November Respondent realized that its lockout strategy had failed. Consequently, it began moving in the direction of resuming production in the bindery, announcement assembly, and cover departments without, however, capitulating to the Charging Party's bargaining demands. At the November 9, 1970, meeting Engle for the first time brought up the possibility of ending the lockout absent a signed contract with the Charging Party. He said that if the Charging Party would give Respondent a no-strike commitment until July 1, 1971, Respondent would end the lockout. A member of the Charging Party's bargaining committee said this was like putting a noose around the Charging Party's neck. Engle asked what the Charging Party's intention was. He asked if Respondent would get a strike if it ended the lockout. Cooper said that he could not give any answer to that question. That day or shortly thereafter (the record is not clear as to the exact date) Respondent's request for a no-strike commitment as the price of ending its lockout was submitted to the locked-out employees by the Charging Party. The employees voted that they would give Respondent the commitment it sought if Respondent, in turn, would give the Charging Party a commitment that an agreement acceptable to the Charging Party would be consummated by July 1, 1971. This counterproposal was relayed to Engle by Cooper. Respondent's proposal and the Charging Party's counterproposal for ending the lockout while negotiations continued became the basis of frequent exchanges between Respondent, in the person of Engle, and the Charging Party, in the person of Cooper, after November 9, 1970, especially in the period between November 9 and 30, 1970, when Respondent began hiring temporary replacements and resumed production in the bindery, announcement assembly, and cover departments. The only modification in either side's position came when Engle cut back the ending date for the no-strike commitment Respondent sought from July 1 to June 21, 1971. He did so because the latter date more nearly coincides with the actual end of Respondent's busy season than the former. This modification first appears in the record in a letter dated November 24, 1970, from Engle to Cooper which memorializes a telephone conversation between them that day.

The possibility that Respondent would resume production with temporary replacements first came up between Respondent and the Charging Party when Engle conferred privately with Cooper at the end of the November 18, 1970, negotiations. Engle told Cooper that he did not know where the negotiations were headed, that Respondent was going to have to get out the "season," and that Respondent could not take a strike during the season. He asked what the Charging Party's intentions were if Respondent ended the lockout without a no-strike commitment from the Charging Party. Cooper did not try to answer the question. Instead, he replied that Respondent did not offer the Charging Party anything and asked if Engle could guarantee they would reach agreement before January 1, 1971. Engle said that he could not give such a guarantee, that Respondent was asking for a no-strike commitment without regard to any other agreements. Cooper said that the Charging Party would not give a no-strike guarantee because Respondent was not offering anything. Engle said that, if Respondent did not get a no-strike guarantee, it could only assume the Charging Party would strike during the busy season to support its demands. Cooper said Respondent was the only one talking about the strike. Engle said, if the Charging Party did not intend to strike, it would not be hurt by a no-strike commitment. Cooper said that Respondent was not offering any money and that it was trying to take all the rights away from employees. The conference broke up on that note.

At the November 23, 1970, meeting of the negotiators, Engle asked the Charging Party to bring someone from its International Union to the negotiations because Respondent had a hard decision to make. He said it was a decision of some magnitude and had to be made by the following Monday (i.e., November 30, 1970). He then passed out copies of a four-page letter dated November 21, 1970, addressed to Cooper and signed by Tyler. After rehearsing the negotiations and Respondent's bargaining positions and situation in detail, the letter reads in pertinent part:

> For some time now, based on the progress of negotiations, it has been the Company's opinion that Bookbinders Union intends, if given that opportunity, to strike during the busy season in support of its bargaining demands. The Company cannot economically take a strike by the Bookbinders Union during the busy season and, if such a strike were to occur, the Company would be at the Union's complete mercy. Knowing that failure to meet delivery schedules of announcements and yearbooks would mean the permanent loss of a large number of customers, the Company would be in no position to resist the Union. The net result would be forced capitulation by the Company, in order to end the strike.
>
> The Company has offered to end the lockout provided the Union will give the Company a no-strike guarantee through June of 1971. The Company made this proposal because it would

allow the Company to guarantee deliveries to customers on a timely basis and would allow employees to return to work without completely eliminating their right to strike in support of their bargaining demands. Unfortunately, the Union rejected this proposal. Notwithstanding the Union's initial rejection of this proposal, the Company is still offering it as a means to end the lockout, and this proposal may be accepted at any time.

The Company is now faced with a double dilemma. If it ends the lockout without a no-strike commitment from the Union, the Company anticipates that the Union will strike during the busy season to enforce its bargaining demands. On the other hand, if the Company does not start immediate production, it will not be able to make deliveries to customers on a timely basis.

After due consideration of all the factors involved, including the Company's commitments and obligations to the schools and to the students who have placed their confidence and trust in Inter-Collegiate Press, the Company hereby notifies you that unless the Company has a signed bargaining agreement with your Union by November 30, 1970, or the Union accepts the Company's proposal to end the lockout, the Company will hire temporary employees to perform all required work in the Bindery areas.

Engle's and Cooper's telephone conversation on November 24, 1970, resulted in several slight modifications of Respondent's bargaining position in addition to changing the proposed ending date for a no-strike commitment from July 1 to June 21. However, the changes were not substantial enough to induce the Charging Party to retreat from its position that it would only give a no-strike guarantee in exchange for Respondent's guarantee that a contract acceptable to the employees would be negotiated by the same date. Consequently, Respondent began hiring temporary replacements for its locked-out employees on November 30, 1970. (It was so meticulous about the manner in which it went about implementing this decision of some magnitude that, because its expired contract with the Charging Party provided seasonal employees become members of the bargaining unit at the beginning of their third season, it recalled five persons and simultaneously placed them on locked-out status because they would have begun their third season if they had been permitted to go to work.) It called in temporary seasonal employees. It hired new employees. One man interviewed on November 30, 1970, actually began working that day. Full production resumed in the locked-out departments on December 1, 1970. It has continued without interruption since that date. (The only bargaining unit work performed in the plant between October 17 and November 30, 1970,

occurred on November 18 when one supervisor spent 8 hours cutting paper to be used in printing announcements. The supply of cut paper on hand when the lockout began had been exhausted.)

Once again, Respondent's decision to use temporary replacements for its locked-out employees was made by Tyler, based on advice from Engle. The portion of Tyler's November 21, 1970, letter which I have quoted above accurately and truthfully sets forth Tyler's reasons for reaching this decision. In summary, Respondent elected to resort to the use of temporary replacements rather than end its lockout because it feared that the Charging Party would strike during the busy season, thus making it impossible, if the strike lasted any substantial length of time, for Respondent to meet its delivery date commitments to its customers. It selected December 1, 1970, as the date beyond which it could not afford to have its bindery and related operations shut down if it was going to be able to meet its production requirements during the busy season starting February 1, 1971, because of the time which would be required to train the replacements and the necessity of having some work finished before the season began. Factors which it weighed in reaching its decision were the fact that, by electing to strike during the off season in 1967, the Charging Party had not been able to bring effective pressure to bear on it, the effect of the LPIU's strike on its operations during the prior busy season, the reports it was receiving of its competitors' efforts to persuade its customers to abandon it by pointing to the fact that it was having labor trouble for the second year in a row, and the time at which it would need such items as salesmen's and editors' kits if its sales operations were not to be crippled.

At the meeting held on December 22, 1970, the following exchange took place, in substance if not in haec verbae, between Engle and Cooper (my findings here are a paraphrase of Engle's notes):

> COOPER: You are spending a lot of money to retrain and still won't be able to get the season out [i.e., meet your commitments during the busy season].
> ENGLE: The company told me we are getting production and will get the season out.
> COOPER: You can't retrain 60 people.
> ENGLE: Yes we can. Some of the people are not skilled yet in a week or 10 days they were trained.
> COOPER: You ought to reduce the apprentice time for these people.
> ENGLE: That's not the problem---the company pays them too much money. Non-skilled people are working all over Kansas City for $1.60 to $1.70 an hour. We're interested in ending the lockout if we are assured of getting out the season, but we can't take a strike during the busy season.

COOPER: A lockout has the same effect as a strike.

ENGLE: That's not so. The company is producing and it's going to get out the season. Labor disputes normally settle eventually, but I can't assure you the company will ever agree to some of your proposals, particularly the picket line clause. [Respondent wanted the Charging Party to accept the provision which is now part of its contract with the Printing Pressmen that another union's picket line at the plant would be honored only in the event of a lockout, not in the event of a strike.]

COOPER: You'll just have to wait and see if you can get the season out.

ENGLE: We will. We're training now. In the height of the season we won't be able to train. We're going to be ready to put the season out.

The Charging Party never capitulated. Respondent did. Instead of continuing the lockout until the very end of the 1971 season, i.e., June 21, 1971, Respondent ended it on June 1, 1971. It did so because the critical part of its season was then over. Not all of the locked-out employees elected to return to work when the call went out on May 19, 1971. Consequently, Respondent kept enough of the temporary replacements at work after June 1, 1971, so that it continued to have a full complement of employees, while discharging the balance of them. It was this fact which gave rise to Cases 17--CA--4762 and 4826.

3. Other facts

The Charging Party paid benefits in the amount of $58,681 to its members during the lockout. It was disbursed by checks drawn on the Charging Party's "Strike Benefit Fund." The checks specified on their faces that the money being paid was a "Lockout Benefit." The words "Strike Benefit Fund" also appear on the faces of the checks.

The work stoppage at Inter Collegiate Press from October 16, 1970, through May 31, 1971, is referred to from time to time in the minutes of meetings held by Charging Party as well as the minutes of meetings of another labor organization in the Kansas City area. Sometimes it is referred to as a "strike." Other times it is referred to as a "lockout."

At some time or times during the period from December 1, 1970, through May 30, 1971, some locked-out employees worked for employers other than Respondent. The record does not reveal how many or the length of the period or periods during which they worked.

In the year ending at the close of the 1970 season, approximately 94 percent of Respondent's work was performed pursuant to contracts with educational institutions. Yearbooks comprised about 79 percent of these sales and announcements comprised about 15 percent of these sales. The remaining 6 percent of Respondent's sales was commercial work. Respondent also manufactured 70 percent of its total yearbook volume between January 1 and June 27, 1970; 66 percent of its total yearbook volume between February 1 and June 27, 1970; and 52 percent of its total yearbook volume between April 25 and June 27, 1970. Respondent also shipped 100 percent of its announcement volume between January 1 and June 30, 1970, and shipped 98 percent of its announcement volume between February 1 and June 30, 1970.

Respondent bills its customers for purchases after the products have been shipped. In the years ending at the close of the 1969 and 1970 seasons, Respondent billed 69 percent and 64 percent, respectively, of its volume in yearbooks and announcements in March, April, May, and June.

There are 66 full-time and permanent seasonal employees in the unit represented by the Charging Party. To complement this regular work force, Respondent, each year, employs a number of temporary seasonal employees. For the weeks ending November 30, 1969, February 6, 1970, and May 4, 1970, Respondent employed 66 persons, 93 persons, and 144 persons, respectively, in the unit represented by the Charging Party.

From November 30, 1970, through May 31, 1971, Respondent hired 249 employees in the bindery, announcement, and cover departments. When the lockout ended, 50 of the 66 locked-out employees returned to work. Respondent retained 61 of the employees it had hired during the lockout.

Respondent works a large number of overtime hours during the busy season. During the period from the week ending January 25 through June 28, 1970, Respondent worked over 9,000 hours overtime in the bindery, over 1,500 hours overtime in the cover area, and over 3,000 hours overtime in the announcement assembly area.

In the engraving press department, an area of the plant represented by the Printing Pressmen, Respondent operates panel foil presses, small die presses, and large die presses. For the years ending at the close of the 1969 and 1970 seasons, Respondent, respectively, produced the following impressions on the equipment: 6,607,537 and 6,586,000 on the panel foil presses; 9,564,554 and 9,986,893 on the small die presses; and 5,204,060 and 5,336,441 on the large die presses.

In September 1970, Respondent made a projection, computed on a monthly basis, of the number of impressions it was required to

produce on each type of press in the engraving department in order to make timely delivery of its announcements for the 1971 season.

As of December 5, 1970, Respondent had not met its calculated production requirements and, on the basis of its production capabilities, Respondent projected that by the end of December 1970, it would be over 700,000 impressions off forecast on the panel foil presses, about 500,000 impressions off forecast on the small die presses, and over 700,000 impressions off forecast on the large die presses.

Respondent did not meet its production estimates in the engraving department, in part, because of a shortage of cut paper. From October 16 through November 17, 1970, no paper was cut in the bindery because of the lockout. Respondent was out of cut paper. It was required to cut paper or close the engraving press department. If Respondent had not cut paper for 8 hours on November 18, 1970, and cut paper on a continuing basis after December 1, 1970, it could have achieved no further production in the engraving department, and it would have failed to deliver 100 percent of its announcement business for the 1971 season.

In the years ending at the close of the 1969, 1970, and 1971 seasons, Respondent shipped 1,002, 899, and 916 cover orders, respectively, by June 30. By February 1, 1969 and 1970, Respondent had respectively completed 36 percent and 35 percent of its total cover volume. As of December 1, 1970, Respondent had completed no covers for the 1971 season, and, on the basis of using inexperienced temporary replacements to perform the cover work involved, Respondent had a 9-week backlog of work in the cover area.

Respondent must produce about 35 percent of its total cover volume by February 1 of each year in order to make deliveries on a timely basis, since, by that date, Respondent is working at 100 percent of its production capacity and, if necessary production is not accomplished in the cover area, it is not possible to make up the production loss. Because of production limitations, if Respondent had not commenced work in the cover department on December 1, 1971, it would not have been able to train temporary replacements, clean up the backlog of work in the department, and produce approximately 35 percent of its seasonal cover volume by February 1, 1971.

On December 1, 1970, Respondent had a 12-week backlog of work in the bindery. To perform this work using inexperienced temporary employees, Respondent had approximately a 17-week backlog of work.

In the years ending at the close of the 1969, 1970, and 1971 seasons, Respondent shipped 1,002, 899, and 929 bindery orders, respectively, by June 27.

In the year ending at the close of the 1969 season, Respondent produced a total of 542,115 books in the bindery, 475,986 of which were produced between April 1 and June 30, 1969. In the year ending at the close of the 1970 season, Respondent produced a total of 521,559 books in the bindery, 463,725 of which were produced between April 1 and June 30, 1970.

By June 30, 1971, Respondent was obligated to manufacture and ship from the bindery 916 yearbook orders, or 540,280 individual books. Respondent has a weekly production capacity of 50,000 stiff book covers in the bindery. On the basis of the 1969 and 1970 seasons, Respondent was required to produce 460,000 books between April 1 and June 30, 1971, in order to deliver on a timely basis for the 1971 season. To produce 460,000 books in the 8-week period involved, Respondent was required to work at 100 percent of its production capacity; i.e., two shifts, 10 hours per day, 7 days per week.

To complete the backlog of work, train new employees, and produce the necessary volume of books required, it was necessary for Respondent to start production in the bindery on December 1, 1970, in order to ship its announcements and yearbooks for the 1970--71 season on a timely basis when it opted for the hiring of temporary replacements in lieu of calling off the lockout.

In the calendar year 1970, Respondent had a net loss before taxes of $261,046. Of this amount, about $120,000 is directly attributable to the labor dispute with the Charging Party.

Respondent has an announced policy of granting equal wages and benefits to all employees in the plant. If Respondent had granted the Charging Party's bargaining demands throughout the plant, the 2-year cost to Respondent would have been $1,274,000.

Prior to December 1, 1970, Respondent made an estimate of the time required to train new employees to perform the work functions in the cover, bindery, and announcement assembly areas. The training times ranged from 2 weeks to 12 weeks, depending upon the equipment involved.

On November 30, 1970, Respondent commenced hiring replacements to resume full production in the cover, bindery, and announcement assembly areas. In order to retain a complete work force throughout the lockout period, as already indicated, it was necessary for Respondent to hire well in excess of 66 persons, the normal complement of the unit. Turnover of the temporary replacements made it difficult for Respondent's five supervisors to train a sufficient work force to produce the 1971 season on a timely basis. The temporary replacements employed by Respondent in the bindery worked at an average productivity of 59 percent.

In the 1971 season, Respondent had poor deliveries on announcements. The deliveries on yearbooks were fairly good, but Respondent experienced quality problems. In both the 1969 and 1970 seasons, Respondent had a total volume of business of about $6,200,000. As a result of late deliveries and poor quality in the 1971 season, Respondent's volume of business was reduced by an estimated $700,000.

After December 1, 1970, Respondent subcontracted $50,012 of work that it would not have subcontracted in the 1971 season except for the labor dispute with the Charging Party. The work was subcontracted because Respondent did not achieve the necessary production levels in the plant with temporary replacements in order to deliver its merchandise on a timely basis.

4. Analysis and conclusions

Respondent's defense to the charge that it violated Section 8(a)(1) and (3) of the Act by utilizing temporary replacements for the locked-out employees has two prongs. The first is that what was admittedly a lockout in its inception on October 16, 1970, became a strike on and after November 9, 1970, even though Respondent admittedly never took any steps, prior to May 31, 1971, to end the lockout and the Charging Party admittedly never declared that it was on strike.

The events of November 9, 1970, which Respondent relies on are its offer to end the lockout if the Charging Party would give a no-strike commitment to run through the busy season and the vote of the Charging Party's members to reject that offer. The events after November 9, 1970, which Respondent relies on are its continuation of that offer, the Charging Party's counteroffer to swap such a commitment for a commitment by Respondent that negotiations would result in a contract satisfactory to the Charging Party by the end of the busy season, and the various exchanges between Respondent and the Charging Party on the subject, such as the conversation between Engle and Cooper at the December 22, 1970, negotiations. Respondent's argument is summarized in this excerpt from its masterful brief:

> Although the work stoppage in the present case began as a lockout for the purpose of bringing negotiations to a conclusion, Respondent soon ceased conditioning the end of the lockout on a signed contract and, instead, insisted only upon a no-strike assurance from the Charging Party as a condition for ending the lockout. The Charging Party, at this point, had the power to end the lockout by agreement not to strike. Thus, if the Charging Party and the employees truly wanted to work during the period in question, they could have done so simply by agreeing that they would work. Instead, the Charging Party refused to grant a no-strike commitment,

which would have allowed the employees to immediately return to work, because the Charging Party was dissatisfied with the Respondent's position in negotiations. In short, the employees (were on strike) did not return to work because of the status of negotiations.

Finally, the Union conditioned acceptance of Respondent's no-strike proposal upon receipt of a guarantee by Respondent that a contract satisfactory to the employees would be agreed upon prior to June 21, 1971. At this point, the Charging Party was using its refusal (to return to work) to grant a no-strike assurance for the same purpose that unions often use the affirmative power of an economic strike---to obtain economic or contract concession from a company. In fact, the picketing after October 16, 1970, was for the purpose of keeping people and trucks out of the plant to help settle the dispute . . . . The Charging Party's strategy was succinctly revealed during the bargaining meeting on December 22, 1970. At that time, Cooper said that Respondent could not retrain persons to replace the employees represented by the Charging Party, that Respondent could not get the season out, that the lockout had the same effect as a strike, and that he would just have to wait and see if Respondent could get the season out. . . .

Clearly, the Charging Party was striking without having called a formal strike.

Respondent's argument is without merit. In the first place, the cases it cites (American Manufacturing Concern, 7 NLRB 753; Electric Auto-Lite Co., 80 NLRB 1601; Willamette Association, 125 NLRB 924; Marydale Products Co., 133 NLRB 1232; Erie Forge and Steel Corporation v. Unemployment Comp. Bd. of Review, 146 A.2d 751; Punxsutawney Co. v. Unemployment Comp. Bd. of Review, 149 A.2d 683; Almada v. Administrator, Unemployment Comp. Act, 77 A.2d 765) are inapposite. More importantly, in Willamette, supra, the Board said, "A lockout by definition clearly involves an employer's refusal to allow employees to work when they are ready and willing to do so." Here, there is nothing in the record to indicate that Respondent's employees were at any time not ready and willing to return to work as, in fact, they did on June 1, 1971, when Respondent recalled them. Respondent asks why, if it did not intend to strike, the Charging Party would not give it an unconditional no-strike commitment to protect it during the busy season. The short and simple answer is that the Charging Party was using a weapon from its arsenal to bring pressure on the Respondent just as Respondent was using a lockout to bring pressure on the Charging Party. There is no requirement in the law that a union must give a no-strike commitment as the price of avoiding a lockout of the employees it represents. Therefore, the Charging Party was acting

within its legal rights when it insisted on a quid pro quo for the commitment Respondent sought. The work stoppage which began on October 16, 1970, was Respondent's doing. It could only cease to be a lockout when the Respondent or the Charging Party took some affirmative act to change its nature. The Charging Party never took any such step. The next affirmative step which Respondent took was to end the work stoppage on June 1, 1971. Therefore, it was a lockout during the entire period.

The alternative prong of Respondent's defense is that it had a legal right to use temporary replacements for its locked-out employees under the circumstances which existed. First, it argues, on the basis of American Ship Building Co. v. N.L.R.B., 380 U.S. 300, and N.L.R.B. v. John Brown d/b/a Brown Food Stores, 380 U.S. 278, that "the Supreme Court has interpreted the Act as sanctioning the use of lockouts by employers as an economic tool to be utilized within the process and procedure of collective bargaining as well as sanctioning an employer's hiring and use of temporary replacements during a lockout." After taking the position, based on its analysis of the legislative history of the Act, especially the Taft-Hartley Amendments of 1947, that the lockout and the strike are correlative powers and that the Board may not dictate the procedures it may employ to make its lockout effective, Respondent recognizes that the situation presented here, at least insofar as this aspect of its argument is concerned, is still on the frontier of a developing area of the law when it states:

> In view of the decisions in American Ship Building and Brown, Respondent is simply asking for the logical extension of this law to include the hiring and use of temporary employees during the period of a lockout as a legitimate right of an employer. The circumstances in this case present a rational and logical basis upon which to close the heretofore incomplete perimeter of an employer's right to resort to the lockout device as an economic tool in the process and procedure of collective bargaining.

This argument might well be characterized as a plea for a finding that the use of temporary replacements during a legal lockout is a per se nonviolation of the Act. In this connection, it must be kept in mind that there is no issue in this case as to the legality of the lockout itself. Therefore, there is no question but that Respondent's motive for doing what it did was not a discriminatory one. Respondent is correct when it states, in connection with the next phase of its argument, that the test of its conduct is not whether it sought to discourage union activity or evade bargaining, for those points are conceded by the General Counsel, but whether its activity was inherently prejudicial to union interests and devoid of significant economic justification. This state of the law, it seems to me, precludes a per se finding either way. For that reason, I reject this part of Respondent's defense.

The second facet of Respondent's argument that it had a legal right to use temporary replacements goes like this: Respondent had no choice but to use temporary replacements if it were to insure continued operations on an economical basis. The test of the legality of its conduct is whether its activity was inherently prejudicial to union interests and devoid of significant economic justification. Under the objective circumstances which existed it had reasonable cause to believe that the Charging Party would strike during its busy season if negotiations continued that long and its regular employees were still at work. Therefore, the economic situation which it faced justified self-help measures. The use of temporary replacements was a legitimate form of self-help to protect its economic interests because it was defensive in nature under the rationale of such cases as Betts Cadillac Olds, Inc., 96 NLRB 268, albeit the lockout began as an offensive lockout. The use of temporary replacements is not inherently destructive of employee rights; i.e., the Court of Appeals for the Seventh Circuit did not intend such a sweeping finding when it referred to the use of temporary replacements in a lockout situation as a per se violation in its decision in Inland Trucking Co. v. N.L.R.B., 440 F.2d 562. The Inland Trucking case is distinguishable. Respondent's position is well summarized by this sentence from its brief, as slightly modified by me:

> On the basis of the . . . facts [in this case] it is submitted that Respondent's use of temporary replacements on December 1, 1970 was a "defense" measure to protect itself from a well-founded fear of a disastrous strike at a time most advantageous to the Charging Party [which is not proscribed by the Act].

The first point in this argument at which I part company with Respondent, although it is not the basis of my decision, is that Respondent had a reasonable fear of a strike by the Charging Party during its busy season based on objective considerations. Tyler, the man who made both the decision to lock out and the decision to hire temporary replacements for Respondent, testified at several different points in the hearing about his reasons for fearing a strike during the busy season if he selected the option of ending the lockout instead of hiring temporary replacements when it became obvious that the lockout had failed. He said:

> Q. You stated that one of the reasons you decided to use temporary replacements when you did was because you were afraid if you let the union employees back in without a no-strike committment they would strike during the busy season. What was the basis of your thinking the union would strike you if they got back in?

A. Well, we had offered them on several occasions and asked them for a no-strike commitment during this busy season and I could not understand why they wouldn't give it to us if they didn't plan to strike us. I had the pressure of our sales representatives on me at that time also. They were concerned because they were going to lose a large segment of their business, which was their income, if they didn't receive the orders on time, the customers were telling them that. The union, the experience that we had had in the previous year in the LPIU strike, the binders violated their no-strike clause in the contract and some of the same issues in the 1967 strike by the bookbinders were still major issues in this negotiation.

* * * * *

Q. I want to know specifically what the union's economic demands had to do with your decision to use the temporary replacements.

A. Well first of all we had been negotiating for four or five months with no success. We had tried to use a lockout which was ineffective in bringing a conclusion to these negotiations. We had told them, the union, several times that we could not, we were going to lose money, at least $40,000. We told them this, we couldn't raise the prices of our product and we just didn't have the money to give them their demands. Then when they refused to give us a no-strike commitment I felt we had to take these steps to protect ourselves against the strike.

* * * * *

Q. (By Mr. Engle) Did you make any conclusion with respect to what the failure of the initial lockout meant?

A. The failure of the lockout meant to me that the union was not going to take into account our financial situation. It was not going to change its position on the economic demands which we could not afford to pay them and I thought from that they would strike.

* * * * *

Q. Why didn't you accept the union's offer to return to work without a no-strike commitment?

MR. NIXON: I object to that. It is repetitive. It has been asked and answered already.

TRIAL EXAMINER: Overruled.

A. Well, I felt that the---I couldn't understand, first of all, why they wouldn't give the no-strike commitment. The second thing is that I felt if they came back, they

would wait until the temporary employees had been dispersed, and at that time strike us which would be in our peak season, and we wouldn't be able to get the season out. We would have trouble making the deliveries.

TRIAL EXAMINER: What did you base that judgment on?

THE WITNESS: The major part of my judgment was that I could see no reason, if they didn't intend to strike me, why they wouldn't give me a no-strike commitment. That was the foundation.

As can be readily seen, the theme of Tyler's conclusion that the Charging Party would strike during the busy season to enforce its demands if he gave them a chance to do so by ending the lockout is his inability to understand the Charging Party's bargaining adamancy and its refusal to give an unconditional no-strike commitment. (The only objective circumstance involving the Charging Party he cites is the "fact" that "the binders violated their no-strike clause" during the LPIU strike in 1970. This is not true. The contract in effect between Respondent and the Charging Party at the time contained a standard no-strike, no-lockout clause. However, it also contained a provision that a refusal of employees to cross a picket line set up by another union in the plant would not constitute a breach of the agreement.) As I have already pointed out in another context, the Charging Party had a legal right to insist on a quid pro quo if it agreed to give Respondent a no-strike commitment. Therefore, it does not follow that a refusal to give an unconditional no-strike commitment is an objective circumstance justifying fear of a strike, and Tyler's fear was more subjective than objective. In my opinion, the other objective circumstances relied on by Respondent in its brief, such as the strike by the Charging Party in 1967, are insufficient to outweigh Tyler's answers. In the total context of this case, especially the complete absence of any indication that the Charging Party threatened by word or deed to strike to achieve its bargaining ends, I find that Respondent's fear the Charging Party would strike it during its busy season if given a chance was unreasonable. However, I do not consider the point a crucial one. Even if my finding were to the contrary, I would still decide this case against Respondent for the following reasons:

First, as I have also already indicated in another context, I agree with Respondent that this case should not be decided against it on a per se basis. The relevant part of the court's decision in Inland Trucking, supra, reads:

> We conclude that the bargaining lockout, which was held in American Ship not to be inconsistent with protected employee rights, does become so if the employer does not shut down, but continues operation with temporary replacements. Such lockout forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer.

It would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and content of that right, as protected in 29 U.S.C. § 157.

We conclude that a lockout in the circumstances at bar, accompanied by continued operation with replacement labor, is, per se, an interference with protected employee rights, and, accordingly, per se, an unfair labor practice under § 158(a)(1).

Despite the express use of the phrase, I do not read this as requiring a finding of a violation at all times and under all circumstances. The introductory words of the sentence in which per se appears---"We conclude that a lockout in the circumstances at bar" (emphasis supplied)---permit of no other conclusion.

This case, then, comes down to a question of whether it can be distinguished from Inland Trucking. It would serve no useful purpose to repeat here the numerous grounds Respondent lists as the basis for drawing such a distinction. Viewing this case in the light of the Board's and the court's opinions, expecially the first paragraph I have set forth above from the court's opinion in Inland Trucking, I find no significant difference between this case and that one. In my view the issue framed by the record as a whole is whether an employer who has resorted to an offensive lockout is thereafter entitled to hire temporary replacements if the union does not state affirmatively that it has no intention of striking and refuses to give an unconditional no-strike commitment in a situation where the union has given no explicit objective indication that it will strike. Inland Trucking says that it does not. I am bound by the Board's decision in Inland Trucking. Therefore, I find that Respondent violated Section 8(a)(1) and (3) of the Act when it used temporary replacements for its locked-out employees from November 30, 1970, through May 31, 1971.

B. Cases 17--CA--4762 and 4826

1. Facts in Case 17--CA--4762

When Respondent's regular employees were recalled to work effective June 1, 1971, seven who worked in the cover department

failed to show up. Among the temporary replacements who were retained to fill out the complement needed was Norma Casey. (Miss Casey was one of seven temporary replacements who became permanent employees in July 1971 to replace those who had failed to return to the cover department when the lockout ended. However, at the time of the events in Case 17--CA--4762 she was still classified as a temporary seasonal employee and thus not a member of the bargaining unit represented by the Charging Party.) Among the locked-out employees who returned to the cover department were Irene Barnes, Mary Alice Helm, and Ruby Patterson.

Miss Casey's job during the lockout was inspector on the silk screen dryer. The inspector inspects covers as they emerge from the silk screen machines on a conveyor, rejects those which are imperfect, and boxes or not boxes the remainder, depending on whether the covers are for an American or a Canadian order. She also prepares the boxes and marks them appropriately. When there are no covers to be "picked up" because the silk screen machines are being set up for a run or because they are down for some other reason, the inspector helps the operator by blocking and taping screens to prepare them for use in the silk screen machines. Blocking is the opaquing of pin holes in the screens so that ink does not come through on the covers in places where it is not wanted. Taping is the placing of tape around the edges of the frames which hold the screens for the same purpose. Finally, when she has nothing else to do, the inspector washes used screens.

Miss Casey was experienced and competent in all of these operations. Mrs. Barnes, who went to work at Inter Collegiate Press in November 1966, worked in the silk screen area and performed the inspector's duties for a period of 4 to 6 weeks in the spring of 1970. Mrs. Helm, who went to work at Inter Collegiate Press in April 1964, worked as an inspector for 2 months in early 1965 and from time to time thereafter on a fill-in basis. However, she had not done that work for several years prior to the lockout. Mrs. Patterson, who went to work at Inter Collegiate Press in February 1962, worked in the silk screen area for the first 5 years, not, however, primarily as an inspector. She did from time to time perform the inspector's job during that period. In 1969 she returned to the silk screen area for a short time. When she discovered that she was still allergic to the chemicals used to wash screens, she asked to be transferred to another job. Her request was granted. (Mrs. Patterson was assigned permanently to the silk screen inspector job on June 29, 1971. However, the duties were changed at that time so that she did not have to wash screens.)

Mrs. Barnes, along with several other employees, was on layoff because of a lack of work in the cover department from June 14 through June 29, 1971. On June 11 Gary Belt, manager of the cover department, offered transfers to the silk screen area as machine operators to Mrs. Barnes and the other employees who were laid off

with her in lieu of laying them off. There were three openings for silk screen operators at that time. All of the permanent employees, Mrs. Barnes included, turned down the offer, presumably because, as Respondent concedes, work in the silk screen area is more onerous and the working conditions less pleasant, due to heat, odors, and dirt, than the work Mrs. Barnes, Mrs. Helm, and Mrs. Patterson were regularly assigned to. (Two of these three jobs were eventually filled by retained temporary replacements.)

On June 23 Belt told Mrs. Helm, Mrs. Patterson, Reva Beard, and Gladys Moore that they were laid off because of lack of work. Mrs. Patterson asked how long the layoff would last since, if it were for more than a couple of days, she could not afford to wait for recall. Belt assured the ladies it was only 2 days and they would be back at work the following Monday. Mrs. Helm asked Belt who was going to pick up covers off the dryer. Belt said Norma Casey was. Mrs. Helm asked how come Mrs. Patterson could not be given that work so that she would not have to be laid off at all. Belt said Mrs. Patterson was not qualified.

Mrs. Helm and Mrs. Patterson were on layoff status on June 24 and 25, 1971. (So were Mrs. Beard and Mrs. Moore. They are not named as discriminatees in the complaint in Case 17--CA--4762 because, in the General Counsel's view, they were not qualified to pick up covers coming out of the silk screen dryer.) On those 2 days, Miss Casey performed the inspector's job. Since, apparently, the silk screen machines were not down for any appreciable length of time, she picked up, inspected, and boxed covers. She had no occasion to block, tape, or wash screens. Mrs. Helm and Mrs. Patterson returned to work on Monday, June 28, 1971. Mrs. Barnes returned to work on Wednesday, June 30, 1971. Early in July a vacancy occurred in the inspector job. Belt offered it to Mrs. Barnes, among others. She turned it down. On July 18 there was an opening for a machine operator in the silk screen area. Belt offered it to Mrs. Barnes and Mrs. Helm. Both turned it down.

There were other occasions in the period immediate following the end of the lockout in which temporary replacements whom Respondent retained worked while employees in the bargaining unit were on layoff. The Charging Party has not complained to Respondent that any of these incidents violated the rights of employees in the bargaining unit.

2. Facts in Case 17--CA--4826

On September 1, 1971, David Nixon, counsel for the General Counsel, telephoned Engle. Nixon told Engle that the regional office had determined there was merit to the charge in Case 17--CA--4762 in that Respondent had discriminated against

Mrs. Barnes, Mrs. Helm, and Mrs. Patterson on June 24 and 25, 1971, by giving work to Miss Casey which they were qualified to perform. (The charge in Case 17--CA--4762 is worded in general terms--- "discriminated . . . by laying off or terminating its employees because of their membership in, or adherence to," the Charging Party. The General Counsel concedes that the Norma Casey incident on June 24 and 25, 1971, is the only one of those occasions when temporary replacements worked while bargaining unit employees were laid off which had any color of merit.) Engle disputed their qualifications. He called Tyler and obtained Tyler's permission for a test to see whether they were, in fact, qualified. His purpose was to obtain data to submit to the Regional Director in an effort to persuade him to change his mind or, if worse came to worst, to present to a trial examiner in Respondent's defense. Engle then telephoned Belt and explained the situation to him. He instructed Belt to use Mrs. Barnes and Mrs. Helm on the inspector job as long as necessary on September 2 and 3 to determine whether they were, in fact, qualified to perform it. He instructed Belt not to test Mrs. Patterson because he would rely on Mrs. Patterson's allergy history as the defense in her particular case. He told Belt to watch Mrs. Barnes and Mrs. Helm closely and keep a record of what they did and how well they did it.

Belt followed Engle's instructions. He told Charles Koca, the supervisor in the silk screen area, what was going on and instructed him to observe and take notes also. He moved Terry Randel, the leadman in the silk screen area, to other duties. He instructed other employees in the silk screen area to refer any questions Mrs. Barnes and Mrs. Helm might ask about the work to him. All day September 2 and the morning of September 3, Belt acted as the supervisor, performing Koca's normal duties, and Koca acted as the leadman, performing Randel's usual duties. Belt assigned Mrs. Helm and, a little later, Mrs. Barnes to the inspector job on the morning of September 2. They worked it for approximately a day and a half. They performed all the duties, including washing screens. All the work they did was on orders being processed for customers with the exception of the screens they washed. Since there were no screens ready for washing in the normal course of events, Belt prepared some specially so that he could observe Mrs. Barnes' and Mrs. Helm's skill in that operation. Belt and Koca watched Mrs. Barnes and Mrs. Helm closely and recorded what they observed. Around noon on September 3 Belt returned Mrs. Helm and Mrs. Barnes to their usual jobs.

Belt forwarded the data he and Koca had collected to Engle. Engle elected not to submit it to the Regional Director. Instead, he introduced it into evidence in this proceeding.

3. Analysis and conclusions

Much of the protracted hearing in this proceeding was devoted to whether Mrs. Barnes, Mrs. Helm, and Mrs. Patterson were, in fact, qualified to do the work which Miss Casey actually did on June 24 and 25, 1971. Boxes of imperfect covers which Mrs. Barnes and Mrs. Helm allegedly approved as flawless on September 2 and 3, 1971, were brought into the hearing room. Mrs. Barnes and Mrs. Helm took the witness stand on rebuttal to testify that covers exactly like these were indeed rejected by them. The probative value of all evidence such as this was nil.

In my view, as developed below, Case 17--CA--4762 does not turn on the qualifications of any or all of the three ladies named in the complaint. Even if each were infinitely better qualified than Miss Casey, the General Counsel would still not prevail. It is sufficient for the purpose of this "issue" to point out, first, that the parties are not in agreement as to the work at issue. In the General Counsel's view, all that was involved was the almost routine act of picking up covers from a conveyor belt and stacking them in boxes. In Respondent's view, in order to be qualified the three ladies would have had to demonstrate skill, knowhow, and physical capacity to do any of the chores the inspector might be called on to perform in the course of a day's work. Next, since Miss Casey, a capable inspector, could have been called upon on June 24 and 25, 1971, to do more than merely pick up covers and put them into boxes and since Mrs. Barnes and Mrs. Helm did not dispute the testimony of Belt, which I credit, about the generally inept manner in which they went about blocking, taping, and washing on September 2 and 3, 1971, it is obvious that they, at least, were not as qualified as Miss Casey for the inspector job. Finally, as to Mrs. Patterson, there is no basis in the record for finding that Belt knew prior to June 24 and 25 that washing of screens would not be required those days. Therefore, her allergy obviously disqualified her, for, even though the duties of the job were subsequently changed for her benefit to eliminate contact with the chemicals to which she is allergic, as of June 24 and 25 Respondent was under no legal duty to grant her such a favor. I find, therefore that neither Mrs. Barnes, Mrs. Helm, nor Mrs. Patterson was as qualified as Miss Casey to do the work which Miss Casey might reasonably have been called on to perform as inspector on the silk screen dryer on June 24 and 25, 1971, although they might have been able to do what Miss Casey actually did those days without any undue harm to Respondent's production.

The General Counsel fails in both Cases 17--CA--4762 and 17--CA--4826 for lack of proof. The 8(a)(5) aspect of the former is predicated on the theory of a unilateral change in working conditions. In that respect, the evidence in the record is insufficient for me to find or infer that Respondent had any policy

or practice of favoring unit employees over nonunit employees in the assignment of available work at times when temporary seasonal employees were part of the work force. The contract between Respondent and the Charging Party which expired on September 1, 1970, provided for layoff and recall by seniority where, in Respondent's judgment, ability and physical fitness were relatively equal. Other provisions (one that "employees" generally will be transferred in order to avoid layoff; another that permanent seasonal employees shall be laid off prior to full-time employees) throw no light on the problem. In any event, the contract was not in effect at the time at issue. Therefore, there is no basis in the record for a finding that Respondent altered any existing condition of employment when it assigned Miss Casey and not Mrs. Barnes, Mrs. Helm, or Mrs. Patterson to the 2 days' work at stake.

The 8(a)(3) issue in both cases and the 8(a)(4) issue in Case 17--CA--4826 turn on Respondent's motive for treating the three ladies as it did. The General Counsel seeks a finding that Respondent was motivated in both situations by animus against the Charging Party. I have difficulty understanding the General Counsel's position since, having conceded the legality of Respondent's lockout, he would seem to have conceded Respondent's lack of animus in the total situation which existed. American Ship Building, supra, stands for the proposition that a lockout does not violate Section 8(a)(3) of the Act so long as an employer is motivated solely by a desire to secure a favorable contract and not by a desire to interfere with his employees' Section 7 rights. If Respondent had no animus against the Charging Party in locking out, why would it have acted from such animus in dealing with its employees after they returned to work? (There is nothing in the record which would indicate any animus against Mrs. Barnes, Mrs. Helm, or Mrs. Patterson as individuals based on their union activities.) In any event, I think that precisely the opposite is the only inference that can be drawn from the record as a whole. In finding that Respondent entertains no animus against the Charging Party, I have not overlooked the fact that the upshot of Respondent's confrontation with LPIU in 1970 was LPIU's loss of its status as bargaining representative for a unit of Respondent's employees. If that fact is entitled to any weight, it is minimal when weighed against all the evidence which establishes the meticulous care with which Respondent went about trying to win its bargaining war with the Charging Party by using its legal right to lockout employees and, when that weapon failed, by using what it considered to be its legal right to replace them with temporary employees. The fact that, in my opinion, it had no legal right to take the latter step under the circumstances which existed falls far short of proving a plot to rid itself of the Charging Party once and for all. I find, therefore, the General Counsel has failed to prove that Respondent's motive for treating the three ladies as it did had anything whatsoever to do with their union membership

or adherence or with animus Respondent felt against the Charging Party as an institution.

Similarly, the 8(a)(4) aspect of Case 17--CA--4826 is predicated on the theory that Respondent discriminated against Mrs. Barnes and Mrs. Helm because they were involved in Case 17--CA--4762. They were assigned to more onerous and demanding work for a day and a half, as Respondent readily admits. But it is obvious that Respondent's purpose in making those assignments was not to punish them because they gave testimony under the Act within the meaning of Section 8(a)(4) by cooperating with the General Counsel's investigation of Case 17--CA--4826. In fact, it is somewhat paradoxical for the General Counsel's complaint to emphasize the onerous and demanding nature of the silk screen inspector job in this case when the gravamen of Case 17--CA--4762 is that Respondent discriminated against the same two persons by denying them the same work at another time. Be that as it may, Respondent's sole motive for assigning Mrs. Barnes and Mrs. Helm to the job on September 2 and 3, 1971, and observing their performance closely was to collect data it could not acquire in any other way to counter the data (presumably the assertions of Mrs. Barnes and Mrs. Helm themselves to the Board's investigator) on which the Regional Director had relied in deciding there was merit to the charge. In issuing his instructions to Respondent for the testing of Mrs. Barnes' and Mrs. Helm's qualifications, Engle did not go beyond the limits within which an attorney may lawfully operate in preparing a case for trial. In actually carrying out the tests, Belt did not go beyond Engle's instructions.

There remains only the possibility that these cases involve a violation of Section 8(a)(3) because they fall in the category where encouragement or discouragement of union activity is such a natural consequence that no proof of discriminatory motive is required or that they involve an independent violation of Section 8(a)(1) where motive is immaterial. At the close of the hearing counsel for the General Counsel took what I conceive to be the ultimate possible position in these cases; i.e., that Respondent's employees, when they returned from lockout, were entitled to all the work they were qualified to do over retained temporary employees regardless of Respondent's motive for giving the work to the replacements. I disagree. Absent a discriminatory motive, Respondent was not barred by the Act from assigning work to Norma Casey rather than to Irene Barnes, Mary Alice Helm, or Ruby Patterson on June 24 and 25, 1971, or from transferring Mrs. Barnes or Mrs. Helm to that same work on September 2 and 3, 1971. Because the General Counsel has failed to prove a condition of employment which was changed by Respondent in Case 17--CA--4762 and to establish a discriminatory motive in either case, I find that he has failed to prove a violation of Section 8(a)(1), (3), or (5) of the Act in Case 17--CA--4762 or a violation of Section 8(a)(1), (3), or (4) in Case 17--CA--4826.

Upon the foregoing findings of fact, and on the entire record in this proceeding, I make the following:

Conclusions of Law

1. Inter Collegiate Press, Graphic Arts Division---Sargent Welch Scientific Co. and Sargent Welch Scientific Co. is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Bookbinders Local No. 60, International Brotherhood of Bookbinders (AFL--CIO), is a labor organization within the meaning of Section 2(5) of the Act.

3. By using temporary replacements for its locked-out employees from November 30, 1970, through May 31, 1971, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The allegations that Respondent has violated Section 8(a)(1), (3), (4), and (5) of the Act contained in the complaints in Cases 17--CA--4762 and 17--CA--4826 have not been sustained.

The Remedy

Respondent contends that backpay for its locked-out employees would be an improper remedy because the Charging Party refused its request for an unconditional no-strike commitment, "a reasonable protective measure to safeguard Respondent's operations." In support of this proposition it cites Betts Cadillac Olds, Inc., supra; Texas Gas Corporation, 136 NLRB 355; Indiana Ready Mix Corp., 141 NLRB 651; V-O Milling Co., 43 NLRB 348, and Sawyer Stores, Inc., 190 NLRB No. 129. None bear any relation, factually, to the situation here. All are inapposite. In the latter three, especially, the union's offer to return to work was found to be conditional. Here, there was nothing conditional about the Charging Party's offer to return to work if Respondent ended the lockout. The only condition it sought to impose related to Respondent's request for a no-strike commitment.

Respondent advances various subsidiary arguments. Relying on Packard Bell Electronics Corporation, 130 NLRB 1122, it contends that any backpay liability should be reduced by the approximately $50,000 it expended in extra subcontracting during the lockout. Relying on H. K. Porter Co. v. N.L.R.B., 397 U.S. 99, and Ex-Cell-O Corp., 185 NLRB No. 20, it argues that a backpay order would be based on a speculation that Respondent would have ended the lockout if it had not decided to use temporary replacements.

In support of this position, it seeks a finding that the record justifies an inference that Respondent would have taken a strike at least until February 1, 1971, the beginning of the busy season, thus limiting backpay to the February 1-May 31, 1971, period if I reject the concept that there is no showing that locked-out employees would have had earnings from November 30, 1970, on but for Respondent's unfair labor practice. Finally, Respondent argues that any liability for backpay should be limited to profits, if any, earned by Respondent as a result of its use of temporary replacements; i.e., profits earned during the period November 30, 1970, through May 31, 1971. These arguments are equally without merit.

In my view, Respondent hit the nail on the head when, in its brief, it stated:

> Back pay is applicable only when the employees make clear they are willing to work and to remain at work, when they have some legal right to work and when they show some loss in earnings as the result of being denied a legal right to work.

All those conditions have been met here. Therefore, I will recommend backpay for all locked-out employees for the November 30, 1970-May 31, 1971, period, computed on a quarterly basis plus interest at 6 percent per annum, as prescribed in F. W. Woolworth Company, 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716, as well as that Respondent cease and desist from the unfair labor practice found and post an appropriate notice. Since the record indicates that all the locked-out employees have already been offered reinstatement to their former jobs and that those who accepted it have already been restored to their seniority and other rights and privileges, I will not include such provisions, customary in discrimination cases, in my recommendations.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:1/

1/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Inter Collegiate Press, Graphic Arts Division---Sargent Welch Scientific Co. and Sargent Welch Scientific Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Bookbinders Local No. 60, International Brotherhood of Bookbinders (AFL--CIO), or any other labor organization, by using temporary replacements for its locked-out employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Pay its employees who were locked out from October 16, 1970, through May 31, 1971, for the earnings they lost as a result of Respondent's use of temporary replacements for them from November 30, 1970, through May 31, 1971, plus 6 percent interest.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its plant in Mission, Kansas, copies of the attached notice marked "Appendix."2/ Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

2/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.3/

IT IS ALSO ORDERED that the complaints in Cases 17--CA--4762 and 17--CA--4826 be dismissed in their entirety.

Dated at Washington, D.C.

3/ In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a trial, that we violated Federal law by using temporary replacements for you while you were locked out, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other aid or protection
To refrain from any or all of these things.

WE WILL NOT discourage membership in Bookbinders Local No. 60, International Brotherhood of Bookbinders (AFL--CIO), or any other labor organization, by using temporary replacements for locked-out employees.

WE WILL NOT in any like or related manner interfere with you or attempt to restrain or coerce you in the exercise of the above rights.

WE WILL pay those of you who were locked out from October 16, 1970, through May 31, 1971, for the earnings you lost as a result of our using temporary replacements for you from November 30, 1970, through May 31, 1971, plus 6 percent interest.

TXD--40--72

All our employees are free to join Bookbinders Local No. 60, International Brotherhood of Bookbinders (AFL--CIO), or any other labor organization.

INTER COLLEGIATE PRESS, GRAPHIC ART DIVISION---SARGENT WELCH SCIENTIFIC CO. AND SARGENT WELCH SCIENTIFIC CO.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816--374--5181.

APPENDIX C

STATUES INVOLVED.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 et seq.) :

Sec 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor orgainzation as a condition of employment as authorized in section 8 (a) (3).

Sec 8. (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Sec 12. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.